

THE EXCLUSIONARY RULE BILLS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST AND SECOND SESSIONS

ON

S. 101

A BILL TO AMEND TITLE 18 OF THE UNITED STATES CODE
TO DEFINE AND LIMIT THE EXCLUSIONARY RULE IN FED-
ERAL CRIMINAL PROCEEDINGS

S. 751

A BILL TO AMEND TITLES 18 AND 28 OF THE UNITED
STATES CODE TO ELIMINATE, AND ESTABLISH AN ALTER-
NATIVE TO, THE EXCLUSIONARY RULE IN FEDERAL
CRIMINAL PROCEEDINGS

AND

S. 1995

A BILL TO REMEDY PROCEDURAL AND STRUCTURAL DEFECTS
IN THE CRIMINAL JUSTICE SYSTEM

OCTOBER 5 AND NOVEMBER 12, 1981; MARCH 16 AND 25, 1982

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THE EXCLUSIONARY RULE BILLS

MONDAY, OCTOBER 5, 1981

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 5110, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Also present: Senators Heflin and DeConcini.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The committee will come to order.

Today the Subcommittee on Criminal Law begins hearings on proposals to limit or abolish the application of the fourth amendment exclusionary rule in Federal prosecutions. Although the exclusionary rule has long been a subject of intense debate, these are, as far as I know, the first congressional hearings that have been devoted solely to an examination of the rule itself.

The fourth amendment to the Constitution, as I am sure all of you know, reads that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The right secured by the amendment is clear. But the penalties for a violation of the right is not. In fact, not until 1914 did the U.S. Supreme Court decide what the consequences would be of transgressing the prohibition against unreasonable searches and seizures.

In *Weeks v. the United States* the Supreme Court held that evidence obtained in violation of the fourth amendment would be barred from use in Federal prosecutions. Thus, the exclusionary rule was born.

Then 47 years later the rule was also made applicable to searches by State and by local officials. That was in the case of *Mapp v. Ohio*.

The exclusionary rule has aroused great controversy from the very beginning. It has been debated by legal scholars. Studies of the deterrent effect on police misconduct have proven inconclusive.

Some of the greatest, most learned and distinguished Justices of the Supreme Court have been found on opposite sides of the issue. Justice Holmes, Oliver Wendell Holmes, and Justice Brandeis wrote in support of the rule. Justice Cardozo questioned the integ-

city of the legal system in which the criminal is to go free because the constable has blundered.

And while at least four members of the present Court have called for a relaxation of the constraints imposed by the rule, other Justices have expressed a continuing commitment to the rule in its original form. So the debate continues.

Today's hearings come at a time when the exclusionary rule is very much in the news. The Attorney General's Task Force on Violent Crime, in its report of August 17, called for a revision of the rule to allow for the introduction of evidence obtained by an officer acting in a reasonable, good-faith belief that he was conducting a lawful search or seizure.

Last week, President Reagan, in a speech before the International Association of Chiefs of Police, emphasized the administration's commitment to reform the exclusionary rule. So it seems to me that the time is ripe for the Congress to undertake a comprehensive and thorough examination of the exclusionary rule and the proposals that are now pending.

Today we will focus on three proposals which seek to abolish the rule or to alter substantially its application in Federal criminal cases. One is Senate bill 101, introduced by the Senator from Arizona, Mr. DeConcini, which would permit the admission of evidence obtained in violation of the fourth amendment unless the transgression was willful or substantial.

The Senators from South Carolina and Utah, Mr. Thurmond and Mr. Hatch, have introduced Senate bill 751, which would abolish the rule and merely replace it with a civil damages remedy. There is a third proposal by the Senator from Kansas, Mr. Dole, which falls somewhere between the other two.

These proposals raise important questions of constitutional law and public policy. Among them: Are the questions of one, whether the exclusionary rule is really mandated by the Constitution, or is it a doctrine which has been made subsequently by judicial fiat and subject to modification or alteration by the Congress by statute; two, the rule is susceptible to congressional alteration, then what alternatives would best serve the goals of the fourth amendment? And three, what were the original purposes for creating the rule and to examine whether they are as valid today as they seemed to be in 1914.

These are issues which are complex and controversial.

The subcommittee is fortunate to have before it today an outstanding panel of witnesses to help us grapple with the questions. We are honored to have as our first witness Mr. D. Lowell Jensen, the Assistant Attorney General in charge of the Criminal Division of the Department of Justice.

Our second witness will be the distinguished attorney general of Maryland and former U.S. attorney for the District of Maryland, Mr. Stephen Sachs.

The third witness will be Steven Schlesinger, a political scientist and professor of politics at Catholic University. Mr. Schlesinger is a critic of the exclusionary rule and has written a number of articles on the subject.

So we will ask Mr. Jensen to please begin.

Mr. Jensen, in accordance with our usual practice, with which you are well familiar, we will include your full statement as part of the record, but you can summarize it in such manner as you see fit.

STATEMENT OF D. LOWELL JENSEN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY ROGER A. PAULEY, DIRECTOR, OFFICE OF LEGISLATION

Mr. JENSEN. Thank you very much, Mr. Chairman.

I am pleased to be here today to present the views of the Department of Justice on this critical topic, a topic of critical import for the enforcement of criminal law in this country, as you already stated. And I will discuss with you how the rule was developed, the specific cases that have implemented the rule in contemporary judicial decisions, and the proposed legislative changes that you have referred to.

The Chair has already read the specific language of the fourth amendment. It is apparent that the exclusionary rule itself is not articulated in the fourth amendment or, for that matter, in any other part of the Constitution, the Bill of Rights, or the Federal Criminal Code.

As Justice Black stated in dissenting from the Supreme Court's reversal of a murder conviction on the grounds that the police had not obtained a search warrant from the proper official, although they did have ample probable cause, "The fourth amendment prohibits unreasonable search and seizures. The amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as a remedy for violation."

The exclusionary rule is, rather, a judicially declared rule of law first stated by the Supreme Court in *Weeks v. United States*. It is intended to implement the prohibition of the fourth amendment against unreasonable searches and seizures by suppression of contraband or other tangible relevant evidence of a crime when such evidence has been obtained by police misconduct.

Of equal importance is the fact that there is no constitutional or statutory provision which defines what is meant by an "unreasonable search or seizure." Rather, as Justice Black noted in the *Coolidge* case, the so-called rule and the law of search and seizure itself are entirely the creation of the courts.

Over the years, in hundreds of hundreds of cases, courts have dealt with a vast range of issues relative to the conduct of searches and seizures from whether a warrant is required, to the sufficiency of evidence presented to a magistrate to obtain a warrant, to the permissible scope of the many kinds of searches that can be undertaken without warrants, thus shaping an appellate amalgam which is the law of search and seizure.

A police officer carrying out a search must look to these cases for the rules which govern conduct of the search. This is a crucial point in any consideration of the so-called exclusionary rule, especially when we realize, as we must, that in any given instance the police officer may find that there is no court decision which deals with the specific search contemplated, or that the cases which have considered the issue are contradictory or that the cases which deal

with the issue are not clear in resolving it. And it is simply not possible to know which course of conduct is lawful and which is unlawful.

When first imposed by the Supreme Court in 1914 by *Weeks*, the exclusionary rule was justified as a means of deterring unlawful police conduct and on grounds of judicial integrity. These grounds are stated by the Supreme Court in *Elkins v. United States* in the following fashion. The deterrence ground is stated in this fashion: "Its purpose is to deter, to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."

The judicial integrity ground is stated as one which seeks to prevent courts from being "accomplices in the wilful disobedience of a Constitution they are sworn to uphold."

Over time, as the rule has been explicated, it has become clear that the true rationale for the rule is deterrence, and the asserted rationale of judicial integrity has been essentially abandoned. I will discuss this further in considering the constitutional status of the Rule. But for now let me quote *United States v. Calandra* for a succinct statement for the present status of the rule's rationale. The rule is "a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved."

Let me now describe several recent cases which demonstrate our central premise that the rule we now see in practice in our courts is unfair and unworkable and must be changed. These cases show that the original purpose of the rule has been severely distorted.

Conceived in deterrence, the rule is now being applied in cases where upon any fair analysis, there is simply no police misconduct to be deterred, and the continued suppression of evidence which states the truth ought not to be tolerated in a rational system of justice.

Cases which make this point most succinctly are those which even though police obtain a search warrant, the exclusionary rule is applied. If we consider *United States v. Shorter*, in this case the FBI and the local police arrested a suspected Ohio bank robber at his house. When the suspect refused to consent to a search, the FBI agent phoned a Federal magistrate, stated his grounds, and a search warrant was issued by the magistrate as permitted by the Federal Rules of Criminal Procedure.

A subsequent search produced the loot, which included bait bills and a firearm. The search was deemed lawful by the trial judge, but the conviction was reversed on appeal when that court decided that although the officer had been placed under oath and that oath had referred to all the testimony he provided during the course of reciting the grounds for the warrant, the failure of the magistrate to require the oath at the very start of the phone conversation violated the Federal rule because the rule requires that the oath be obtained "immediately."

In *United States v. Karanathos*, another case, INS agents obtained a search warrant for a restaurant based on an affidavit which the magistrate found to be sufficient to state probable cause. The criminal harboring of illegal aliens was involved. The district court judge, however, disagreed with the conclusion of the judge

who issued the warrant and decided that probable cause had not been stated and suppressed the evidence which had been obtained by the search.

These cases involved disagreements by Federal judges, not police misconduct. The officers were carrying out their duties as we expect them to, provided their information fully and honestly to the court, and carried out the orders of the court. Suppression of evidence in cases such as these where there is no police misconduct whatsoever that ought to be deterred makes no sense at all.

The application of the rule can also involve a process of second-guessing police officers conducting warrantless searches in the field as well as when magistrates issue search warrants. Consider these cases decided by the Supreme Court in its latest term:

In *New York v. Belton*, a New York State trooper stopped a speeding car; noticed the smell of burnt marihuana, discovered an envelope containing marihuana on the floor of the car, and arrested the occupants. In a subsequent search of the passenger compartment he found a jacket which proved to contain cocaine in a closed zipper pocket.

The defense contended that search of the pocket was unlawful because the trooper failed to get a search warrant beforehand and cited a line of cases based on *United States v. Chadwick*, which had been decided in 1977, which had required warrants to open so-called closed containers—*Chadwick* itself involved a footlocker—in cases where the possessor of the container has exhibited a reasonable expectation of privacy in the container.

The plurality position of the Supreme Court found this search to be lawful, on the same day the Supreme Court decided *Robbins v. California*. In this case, a California Highway Patrol officer stopped an erratically driven station wagon, noticed the smell of burnt marihuana, discovered marihuana in the passenger compartment, and arrested the occupants.

After the defendant announced, "What you are looking for is in the back," as the officer retrieved the marihuana, the officer looked in the recessed rear compartment of the station wagon and found two packages wrapped in green opaque plastic. He opened the packages and found 30 pounds of marihuana.

The defense conceded it was proper for the officer to look in the recessed compartment but raised the same objection that had been proffered in *Belton*. In this case, Justice Stewart opined that, "What one person may put into a suitcase another may put into a paperbag," and found that there was indeed the expectation of privacy contemplated in *Chadwick*, invoked the exclusionary rule and suppressed the evidence because the officer had failed to obtain a search warrant before opening the bags.

The *Robbins* decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; 7 found it valid, 7 invalid.

Now that *Robbins* and *Belton* have been decided, do we know the law which governs police conduct in similar searches?

Justice Brennan offers this comment in his *Belton* dissent: "The Court does not give the police any 'bright line' answer to these questions. More important, because the Court's new rule abandons

the justifications underlying 'Chimel,' it offers no guidance to the police officer seeking to work out these answers for himself."

Justice Rehnquist dissents in *Robbins* by citing the language from Justice Harlan in his concurring opinion in *Coolidge v. New Hampshire*. That language is:

State and Federal law enforcement officers and prosecutorial authorities must find quite intolerable the present state of uncertainty which extends even to such an everyday question as the circumstances under which police may enter a man's property to arrest him and seize a vehicle believed to be used during the commission of a crime.

As we reflect upon the rule of law resident somewhere within these decisions, let us consider an important fact which is often overlooked in exclusionary rule discussions. The search in *Robbins* actually took place on January 5, 1975, long before *Chadwick* was even decided, which was on June 21, 1977.

At the very least, it is fair to say that the applicable rule at the time of the search was even more elusive at that time than it is today and that we have imposed the final definitive sanction of suppression of reliable, trustworthy evidence in such a situation on the assumption that this judicial act will deter police misconduct.

Appellate decisions are sometimes referred to as "teachings of the Court." In the school of the law of search and seizure to which these teachings apply, we find, remarkably, that the examination comes before the lesson.

We offer a final observation on *Belton* and *Robbins* found in the concurring opinion of Justice Powell in *Robbins* to this effect: "The law of search and seizure with respect to automobiles is intolerably confusing."

We would add an additional observation: That a rule of law which suppresses the truth in such a context is itself intolerable.

The result of applying the exclusionary rule in both Federal and State cases such as those described above can and does, in our view, adversely affect the entire system of criminal justice and undermine the confidence of our citizens that there is a rational basis for that system.

As the Supreme Court has stated in *Stone v. Powell*—

The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for fourth amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and the administration of justice.

That comes from *Rakas v. Illinois*—

Changes we will propose in the rule seek to address the dual problems of unjustified acquittals of guilty defendants and of the consequent growing concerns of our citizens that our system of justice is lacking in sense and fairness. Our proposed statute will respond to the frank recognition by the Supreme Court that each time the exclusionary rule is applied, it exacts a substantial social cost for the vindication of fourth amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected.

Even though the Supreme Court's recent decisions concerning the rule show an awareness of its continued heavy burden to society, and although its holdings now turn on a balancing of this cost

against the likelihood of deterrence in a particular situation, the Court has thus far not acted itself to abandon the rule.

It may be that this reluctance involves traditional and proper notions of *stare decisis* and judicial restraint and a desire to have Congress act initially to set national policy in this area. Indeed, the Chief Justice's dissent in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* in 1971 openly invited congressional action. There, the Chief Justice suggested providing a new statutory tort remedy for victims of unconstitutional searches and seizures as a substitute for the exclusionary rule.

In addition to *Bivens*, there are other decisions of the Supreme Court and, in particular, a decision of the fifth circuit, which I will discuss shortly, which lead to our conclusion that the Court today would permit legislative modification of the rule and would sustain reasonable congressional action limiting the rule without the substitution of a new remedy.

Let me first discuss legislative action designed to modify the rule which we believe would be constitutional and appropriate.

The legislative action which we suggest is foreshadowed by statements of the Supreme Court in two cases: In *Michigan v. Tucker*, the Supreme Court said, "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful or at the very least negligent conduct which has deprived the defendant of some right.

By refusing to admit evidence gained as a result of such conduct, the Court hoped to instill in those particular investigating officers or in their future counterparts a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

In *United States v. Peltier*, it is stated:

If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge or properly may be charged with knowledge that the search was unconstitutional under the Fourth Amendment.

The specific action we suggest in the area of legislative limitation of the rule, as contrasted to legislative abolition, is based on a recent significant opinion on the rule rendered by the fifth circuit in *United States v. Williams*.

In that case, the fifth circuit, after an exhaustive analysis of the relevant Supreme Court decisions, announced a construction of the exclusionary rule that would allow admission at trial of evidence seized during a search undertaken in the reasonable and good-faith belief on the part of a Federal officer that his conduct was lawful.

A majority of the 24 judges of that court, sitting en banc, concurred in a decision that concluded as follows:

Henceforth, in this circuit, when evidence is sought to be excluded because of police misconduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.

The *Williams* holding has been followed recently in specific contexts by the highest courts of two States, New York and Kentucky.

Let me just briefly mention the facts in *United States v. Williams* to illustrate the kind of conduct involved. In that case—

Senator MATHIAS. Excuse me. The committee is generally familiar with the case.

Mr. JENSEN. I was going to make it very brief.

As the committee is aware, a DEA agent made an arrest of a person whom he knew was a narcotics violator, on the basis that they were in violation of conditions of release on bail pending appeal after a conviction. The officer was mistaken, but the court reasoned upon also finding that the arrest was lawful based upon a misdemeanor premise, as I have already stated, that the good-faith-reasonable belief would eliminate application of the exclusionary rule.

The *Williams* decision, as we have indicated previously, in our view suggests one appropriate form of legislation to deal with the exclusionary rule. Such a proposal would provide simply that otherwise admissible evidence could not be excluded at trial if it is obtained by an officer who acted in a reasonable and good-faith belief that his conduct was in conformity with the fourth amendment.

Evidence unlawfully obtained in the absence of such a belief on the part of the officer involved, such as by deliberately misrepresenting the facts used to obtain a warrant, would continue to be excluded. Such cases are very rare, and this modification would limit the application of the harsh medicine of the exclusionary rule to situations in which the rules deterrent purpose would arguably be served.

The proposal for legislation that closely follows the *Williams* case was made on August 17, 1981, by the Attorney General's Task Force on Violent Crime after conducting hearings on the issue around the country and receiving input from distinguished persons of all points of view. This proposal, with minor changes, is as follows:

Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in the criminal proceeding brought by the United States if the search or seizure was undertaken in a reasonable good-faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good-faith belief unless the warrant was obtained through intentional misrepresentation.

Before discussing the pending bills which relate to the legislative approaches, including the approach to *Williams*, let me comment on possible legislative action which could be taken based on the Bivens approach of providing a satisfactory alternative remedy and eliminating the rule altogether.

Pending in the House, H.R. 24 provides what we believe may be a first step in this area by amending the Federal Tort Claims Act. We are considering additions to that bill which would legislate the Bivens approach suggested by the Chief Justice. In this regard, we are considering the constitutional issues involved, the judicial system impact, and the potential fiscal impact of such legislation.

We are also considering the possibility of identifying appropriate cases now in the appellate track which would provide a vehicle for reconsideration of the exclusionary rule in light of passage of a bill

such as H.R. 24 without any additions to that bill. Whether or not we would urge legislative action in this regard would depend upon that consideration, and we do not intend to foreclose such an initiative in the testimony presented to the committee today.

The chairman mentioned there are three bills to be commented on—S. 101, S. 751, and I think it is S. 951.

Senator MATHIAS. The Dole amendment to the Department of Justice authorization bill.

Mr. JENSEN. The old bill. Let me first address S. 101.

This is a bill which generally follows the *United States v. Williams* approach and would essentially establish a reasonable good faith limitation on the exclusionary rule. As I have stated, we are in support of legislation to accomplish this goal.

We believe, however, that S. 101 should be modified. In a specific sense, we believe that two of the criteria listed in the bill, those that deal with invasion of privacy and the so-called Fruit of the Poisonous Tree doctrine, cause significant legal problems, and they should be eliminated.

In a more general sense, we strongly counsel that the bill should be expressed in the language recommended by the Task Force on Violent Crime, which follows the language in *United States v. Williams*. Since any legislation dealing with the exclusionary rule will be subject to a rigorous constitutional scrutiny, we suggest that *Williams*, which was decided after a thorough analysis of relevant Supreme Court cases, provides a model that should be followed as closely as possible.

S. 751. This bill takes the approach suggested by the Chief Justice's dissent in *Bivens*. As I have indicated, we are currently examining this general approach and will defer our recommendation until that consideration is completed. We will be discussing these items in some detail in our report on S. 751, but I would like to mention at this time another important issue raised by 751.

As a result of the *Bivens* decision, there are now a large number of so-called constitutional tort lawsuits which attempt to seek redress directly from the individual defendant's personal resources rather than from the Government. Because of well-founded concepts of sovereign immunity, the United States is not amenable to *Bivens* suits.

This current situation is unsatisfactory from the standpoint of individual Federal employee defendants. During the last two Congresses the Department has sought and supported legislation that would generally remedy the twin problems of personal liability and constitutional torts, and at the present time, we continue to support amendment of the Federal Tort Claims Act to provide a comprehensive approach in this area.

S. 751, however, does not provide such an approach. It is limited to fourth amendment violations by investigators and law enforcement officers, and does not enact the comprehensive response we believe to be necessary.

S. 951, as the Chair has stated, in effect involves both the concepts I have addressed, the good faith belief concept and the amendment to the Federal Tort Claims Act. In both instances, I think my comments are appropriate as to that bill. S. 951 does not

use the language of *United States v. Williams*. It does not pattern itself upon that.

As I stated, it is our belief and we would urge that the legislation in this area that would attempt to state a good faith reasonable belief standard should very closely follow the language in *United States v. Williams*, and to that extent we believe S. 951 should be modified.

As to the Federal tort claims problem, the same kind of situation pertains as in S. 751. The approach in the Dole bill is limited to fourth amendment violations and limited to the type of actions by investigators and by police officers. The effect of this is to carve out one portion of the Federal tort claims area, and as I stated, our recommendation is that legislation in this area should be comprehensive and not limited to fourth amendment.

Finally, I would like to discuss why we have concluded that the exclusionary rule is not constitutionally mandated. As I indicated earlier, although very early cases justified the rule in terms of judicial integrity, the deterrence rationale now is its only remaining justification.

The cases I have discussed earlier call into serious question whether the rule does in fact deter unlawful conduct, and the tenuous assumption that it does so has been repeatedly questioned. For example, in 1960, just 1 year before *Mapp v. Ohio*, the case that applied to the States primarily on the belief that it would deter future unlawful conduct, the Court stated in *Elkins v. United States* that "statistics are not available to show whether the rule had any significant deterrent effect."

In one of the best-known research efforts to answer the rule's deterrent effects, Professor Dallin Oaks examined all available data and conducted his own research. He found that such data did not provide any empirical substantiation or refutation of the deterrent effect of the exclusionary rule. He argued that the rule was a failure as a deterrent.

Professor Oaks' views are widely held. Writing in the Yale Law Journal, U.S. District Judge John Newman, of Connecticut, has noted that the available empirical evidence suggests that the rule is not an especially effective deterrent, and many have observed that whatever deterrence occurs may not be worth the frequent price of freeing a guilty person because the constable has blundered.

While other researchers have questioned the methods used in the Oaks study and other critical studies of the rule, the Supreme Court 5 years ago reviewed all evidence and determined that no empirical researcher, proponent, or opponent of the rule has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied.

Nevertheless, the Supreme Court has continued to emphasize deterrence as the rule's sole basis; as I previously stated, that statement of the Court in *United States v. Calandra*.

There are other cases that deal with this issue of the rationale of judicial integrity, and they suggest that the integrity rationale is no longer followed. Specifically, when it is logically extended, the judicial integrity justification for the rule would require that a

court prohibit the use of a legally seized evidence to impeach a defendant.

It also would require abandonment of the standing limitation on who may object to the introduction of unconstitutionally received evidence. Yet the Supreme Court has refused to apply the rule in the case of evidence used for impeachment, and its recent cases have established that no person other than the defendant has standing to ask for the application of the exclusionary rule.

One other comment I think is appropriate. In *United States v. Payner*, the Court said:

The decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement, but our cases also show that these unexceptional principles do not command the exclusion of evidence in every case of illegality. Instead, they must be weighed against the considerable harm that would flow from indiscriminate application of an exclusionary rule.

I earlier mentioned the *Peltier* case as an example of how the Supreme Court has moved toward applying the exclusionary rule only when the conduct of the law enforcement officer is capable of being deterred.

Another example of such movement is in *Michigan v. DeFillippo*. In that case the Court refused to exclude evidence of a violation of one statute when that evidence had been seized during an arrest for a violation of a second statute which was later declared invalid. The Court held that the police were entitled to rely on the presumption of statutory validity, a conclusion consistent with the fact that suppression of the evidence would not be likely to deter such reliance in the future.

Nevertheless, even in the light of these decisions and of the statement in *United States v. Peltier* that "Judicial integrity is not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with law," the Court has not as yet retreated from early holdings that apply the rule in situations analogous to *Michigan v. DeFillippo* where the agents placed similar good faith reliance on a duly issued search warrant which was later found to be defective.

Yet it is precisely in situations where law enforcement officers had performed a search and seizure reasonably and in the belief that their conduct was lawful that it would seem indefensible under the Supreme Court's recent interpretations of the rule to exclude the evidence they have gathered.

Applying the rule in these cases fails to further in any degree the rule's deterrent purpose since conduct reasonably engaged in in good faith is by definition not susceptible to being deterred by the imposition of after-the-fact evidentiary sanctions.

Based on this analysis it is our legal conclusion that the judicially created fourth amendment exclusionary rule cannot be said to have a constitutional base insofar as it is clear that the application of the rule will not significantly advance the Court's stated goal of deterring future unlawful searches or seizures.

In our view, then, legislation prohibiting the exclusion of evidence obtained by actions of law enforcement officers performed in a reasonable and good faith manner would be sustained as constitutional. With that ability to act and with an exclusionary rule which works to deny respect for law and works to deny justice in our

courts, not only can the legislature act; in our view the time for action is upon us.

That concludes my statement, Mr. Chairman. I will be happy to answer questions.

Senator MATHIAS. Thank you very much.

I do have several questions, but first let me recognize the distinguished Senator from Arizona, the author of one of the pending bills.

Senator DECONCINI. Mr. Chairman, due to the time constraints, I would ask unanimous consent that my prepared statement be placed in the record.

Senator MATHIAS. It will so appear.

Senator DECONCINI. I thank the chairman.

I also have a statement from the junior Senator from Utah, Senator Hatch, who is conducting hearings at the present time in the Constitution Subcommittee. He asked that I place his statement into the record in his behalf, and I would ask consent to do so.

Senator MATHIAS. It will also appear.

[The prepared statements of Senators DeConcini and Hatch follow:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

The fourth amendment to the Constitution of the United States provides a "right of the people to be secure * * * against unreasonable searches and seizures * * *." In an effort to apply and enforce that right, the Supreme Court of the United States has imposed the exclusionary rule upon Federal courts since 1914 and upon State courts since 1961. The exclusionary rule is a rule of evidence which excludes, or renders inadmissible in a criminal proceeding, evidence that is illegally obtained by law enforcement officials. Thus, evidence obtained by an illegal search and seizure could not, under present Supreme Court holdings, be considered admissible in any criminal prosecution in the land. It is a judge-made rule of evidence, originated in 1914 by the Supreme Court in *Weeks v. United States*, which bars "the use of evidence secured through an illegal search and seizure." Many have argued powerfully that it is not a rule required by the Constitution. As Justice Black once said: "The fourth amendment does not itself contain any provision expressly precluding the use of such evidence and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures."

The greatest obstacle to replacing the exclusionary rule with a rational process, which will both protect the citizenry by controlling the police and avoid rewarding the criminal, is the powerful, unthinking emotional attachment to the rule.

It is undeniable that, as a result of the rule, the most valid, conclusive, and irrefutable factual evidence is excluded from the knowledge of the jury or consideration of the judge. As Justice Cardozo predicted in 1926, in describing the complete irrationality of the exclusionary rule: "The criminal is to go free because the constable has blundered * * *. A room is searched against the law, and the body of a murdered man is found * * *. The privacy of the home has been infringed, and the murderer goes free."

Fifty years later Justice Powell wrote for the court: "The costs of applying the exclusionary rule even at trial and on direct review are well known: * * * the physical evidence sought to be excluded is typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant * * *. Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded the guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."

I submit that justice is, or should be, a truth-seeking process. The court has a duty to the accused to see that he receives a fair trial; the court also has a duty to society to see that all the truth is brought out; only if all the truth is brought out can there be a fair trial. The exclusionary rule results in a complete distortion of the truth. Undeniable facts, of the greatest importance, are forever barred.

In order to clarify the practical operation of the rule, let us suppose that a number of people have been brutally murdered; a police officer finds some physical evidence strongly indicating the guilt of a certain person, but the officer's search warrant is in some way deficient. The evidence is available to the court, but the court must refuse to consider it, and, if other evidence is insufficient for a conviction, the suspect is released. The following is an excerpt from remarks by Mr. James Zagel, Director of the Criminal Justice Division of the Illinois Attorney General's Office from *The Advocates*.

"A great deal of otherwise reliable evidence is not used in criminal prosecutions because of the operation of the rule. For example, a 1969 study of two Chicago circuit courts showed that during 12 sample days, 457 defendants were prosecuted for narcotics violations and 188 for carrying concealed weapons. Thirty-four percent of the narcotics prosecutions and 36 percent of the weapons prosecutions were met with motions to suppress (i.e., motions to exclude evidence.) Of these, 97 percent of the narcotics motions and 68 percent of the weapons motions were granted. In 1971, in three branches of Chicago circuit court, 2,060 defendants were prosecuted for narcotics violations and 929 for carrying concealed weapons. Forty-three percent of the narcotics prosecutions and 36 percent of the weapons prosecutions were met with motions to suppress evidence; 84 percent of the narcotics motions and 62 percent of the weapons motions were granted."

These statistics suggest that a substantial number of otherwise guilty criminals escape likely conviction because of the application of the exclusionary rule and that police misconduct is the reason for such frequent application. Since the deterrence of police misbehavior is a major justification offered for the rule, these statistics cast doubt on the success of the rule as a deterrent. If the rule has not been a successful deterrent, then it is time to consider effective alternatives.

There is much legal literature which seriously questions the value of the rule. It raises fundamental questions about the deterrent effectiveness of the rule as to police misbehavior and argues that the rule actually encourages certain forms of police misbehavior such as perjury on the witness stand and corruption in the form of protecting certain suspects from conviction. It discusses the numerous liabilities not related to deterrence attached to the operation of the rule. These include: the release of persons who would be convictable in the absence of the rule, the rule's lack of aid or compensation to innocent victims of illegal search and seizure, the tendency of the rule to decrease public respect for the legal and judicial system, the failure of the rule to distinguish between petty offenses and grave crimes or between willful, flagrant violations by police officers and those violations which are unintentional. The rule excludes the most credible kinds of evidence, it tends to intensify plea bargaining, and it contributes to dangerously enlarged notions of what constitutes proper searches.

During the rule's development, the Supreme Court has offered three main reasons for the rule. The principal and almost sole theory today is that excluding the evidence will punish the police officers who made the illegal search and seizure or otherwise violated the constitutional rights of the defendant, and thus deter policemen from committing the same violation again. The flaw in this theory is that there is no convincing empirical data that excluding evidence against a defendant has anything to do with either punishing police officers or thereby deterring them from future violations.

Chief Justice Burger has flatly asserted " * * * there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials," and the Supreme Court has never sought to adduce such empirical evidence in support of the rule. Probably such a connection can never be proved, for as a matter of logical analysis "the exclusionary rule is well tailored to deter the prosecutor from illegal conduct. But the prosecutor is not the guilty party in an illegal arrest or search and seizure; and he rarely has any measure of control over the police who are responsible."

Why is the burden of proving the effectiveness of the exclusionary rule on the proponents of the rule? First, whatever the original justification for the rule set forth in *Boyd v. United States* and *Weeks v. United States*, it is clear that the current Supreme Court considers deterrence to be the primary justification for the rule. If, therefore, the rule is not an effective deterrent, then it is appropriate for the Court to reconsider its position.

Second, it is clear—and the proponents of the rule to some extent concede—that the rule has many costs and disadvantages not related to deterrence. Judge Malcolm Wilkey has discussed some of these costs, but we would do well to list them again;

The rule releases many otherwise guilty persons, some of whom are dangerous or violent;

It diminishes public respect for the legal and judicial system;

It fails to distinguish between more and less serious crimes or between willful, flagrant violations by an officer and "good-faith" errors committed in difficult circumstances;

It excludes the most credible kinds of evidence;

It intensifies plea bargaining, since a questionable search may well be one of the bargaining points between prosecution and defense; and

The rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress.

The possibility of deterrence, therefore, must be weighed against these costs. Since the proponents of the rule offer deterrence as a justification for it, the burden is on them to show that the advantages of deterrence outweigh these heavy social costs.

As Professor Steven Schlesinger has pointed out, "All but one of the seven major studies—those of Oaks, Ban, Spiotto, Canon and Columbia Journal of Law and Social Problems—conclude that the rule does not generally deter. In fact, Canon concludes, in his most recent and methodologically sophisticated study, the rule has not always or even often worked and that the data do not come close to supporting a claim that the rule wholly or largely works."

An example of the irrationality of the exclusionary rule is that no other civilized nation in the world has adopted it. If there were merit in any of the grounds advanced in support of the rule, at least one other country somewhere would have emulated our 65-year-old example. All have shunned it.

As Chief Justice Burger pointed out: "This evidentiary rule is unique to American jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule." As Justice Frankfurter found 30 years ago: "Of 10 jurisdictions within the United Kingdom and the British Commonwealth of Nations which passed on the question, none has held evidence obtained by an illegal search and seizure as inadmissible." The rule in other countries—in England, Canada, Germany, and Israel, for example—is that material evidence, if it is probative and authentic, comes in without regard to whether it was obtained legally or illegally.

The time has come to rid ourselves of a judge-made rule that has ill served us for many years. The purpose for which it was implemented, deterrence of overly aggressive law officers violating the fourth amendment guarantees against unlawful search and seizure, is a laudable goal but the remedy has fallen short of its purpose.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, at the outset of this hearing, I would like to commend you for responding to the wide-spread call for an effective policy for enforcing the fourth amendment's ban on "unreasonable searches and seizures." Since *Weeks v. U.S.*, 232 U.S. 383 (1914), the United States has attempted to enforce the "right of the people to be secure in their persons, houses, papers and effects" by excluding from a criminal trial any evidence seized in violation of the fourth amendment. This suppression doctrine was later extended to encompass the States in 1961 *Mapp v. Ohio*, 367 U.S. 643. Like its creation, the rule's extension occurred in response to a court ruling, not a legislative policy decision. This suppression doctrine, questioned from the beginning, has been justifiably scrutinized and criticized as the crime rate has soared.

This criticism basically establishes that the exclusionary rule has not proven effective in deterring constitutional violations or reducing crime. Instead of holding responsible a law enforcement officer who disregards the Constitution, the rule punishes society by returning the criminal to the streets for lack of evidence to convict him. The officer suffers no legal consequences for his misbehavior. In short the rule rewards the law-breaker, punished society, and ignores the infringer of the Constitution. This situation becomes particularly pathetic when violent criminals, rapists, murderers, and the like, are released because a well intentioned officer overlooked a technicality in preparing the search warrant.

All the critics of the suppression doctrine are not outside of the judicial system. Some of the most articulate opponents occupy or have occupied the lofty position of Supreme Court Justice. For instance, Mr. Justice Black stated: "The Federal Exclusionary rule is not a command of the fourth amendment by is a judicially created rule of evidence which Congress might negate." *Wolfe v. Colorado*, 388 U.S. 25 (1949). Chief Justice Burger commented in a similar vein and also suggested a more effective tool for enforcing the fourth amendment: "Reasonable and effective substi-

tutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insurmountable obstacle to the elimination of the Suppression Doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by Government officials, *Bivens v. Six Unknown Federal Narcotic Agents*, 403 U.S. 388 (1971)."

The Chief Justice's suggestion has great merit. Congress does have an obligation to formulate a policy which will effectively enforce the fourth amendment. Accordingly, I introduced S. 751 to eliminate the Exclusionary Rule and replace it with a remedy that will penalize the individual who violates the Constitution. By eliminating the rule, guilt or innocence of the suspect will depend then upon the actual guilt or innocence of the suspect. All evidence pertinent to that determination would be validly before the court. The rule will be replaced by a civil tort remedy for individuals whose constitutional rights have been infringed. The U.S. Government would be held responsible to pay damages to the aggrieved party. This is exactly the constitutional remedy Congress put into effect when it enacted 42 U.S.C. 1983 (1970).

We could discuss in this context a variety of other issues related to the deficiencies of the Exclusionary Rule. For instance, it makes no distinction between an egregious violation of the fourth amendment and a good-faith mistake. It adds countless hours to the adjudication of criminal offenses at a time when the judicial system is already straining under the burden of time-consuming litigation. The most important point, however, is that it is not an effective protection for constitutional rights. We cannot protect the Constitution by freeing criminals and ignoring those who disregard the Constitution.

Once again, Mr. Chairman, I thank you for holding this hearing and look forward to action which will provide adequate protection for society and the Constitution.

Senator DECONCINI. I have no questions of this witness, Mr. Chairman. I thank you for your courtesy.

Senator MATHIAS. Thank you very much.

Now, Mr. Jensen, as I hear your testimony, what you are telling us is that the Department favors a good-faith exception.

Mr. JENSEN. That is correct.

Senator MATHIAS. But you also, if I hear accurately, are saying that you are not precluding some further recommendations.

Mr. JENSEN. On the basis of the consideration of the *Bivens* approach in, as I stated, the various attendant system impacts and financial impacts of that approach, you are correct, we are not precluding taking a position in favor of such an approach.

Senator MATHIAS. Would you speculate for us, and speculation is always a little dangerous, but would you speculate that such recommendations might actually supplant the good-faith exception?

Mr. JENSEN. I could speculate that that is a possible scenario, but you are correct, it is speculation, so I am not in a position to do other than to say that that is a part of any kind of possible scenario.

Senator MATHIAS. Now, if you did that I would assume that you would go to complete abolition of the rule?

Mr. JENSEN. Yes, that is correct.

Senator MATHIAS. Would you speculate further as to what other possibilities there are?

Mr. JENSEN. I think those are the possibilities. As I stated, we are convinced that the *United States v. Williams* approach is constitutional, and we think that that is a perfectly appropriate way for the legislature to act. We are also considering the *Bivens* approach as another way of acting which in a sense would be more comprehensive in that it would involve Federal Tort Claims amendment and abolition.

Senator MATHIAS. I think the subcommittee would like to get it firmly in mind. Maybe it is the weakness of our intellect that wants us to make sure that we understand this. We want to get it firmly in mind as to the Department's position on congressional authority to modify or abolish the rule. If we don't have that authority, we can close this hearing right now and all go fishing for the rest of the day.

Mr. JENSEN. That is correct.

Senator MATHIAS. Do I hear you saying that the Department's position is that Congress does have the authority to abolish the rule or to modify it, to substitute some other statutory mechanism to deal with police misconduct?

Mr. JENSEN. The way I have stated it, it is very clear in the statement I have made. We conclude that the *United States v. Williams* approach is permissible. Our basic conclusion is that the Bivens approach is also, but we have, as I say, deferred that matter, so I would rather not comment specifically on the constitutional problems in that sense.

Senator MATHIAS. You are going to leave us to our own judgment as to constitutionality? That is a very dangerous exercise.

Mr. JENSEN. Ultimately it is a question for the Supreme Court. I am sure we are all aware that the Supreme Court has an abiding interest in this matter.

Senator MATHIAS. Of course, I rather agree with the Chief Justice that all of us who play a part in public life have a responsibility to judge what the Constitution means.

Mr. JENSEN. I totally agree with that or we would not be here. We feel that is perfectly appropriate for us to take a position as professionals in law enforcement and for the legislature to take a position and act.

Senator MATHIAS. All right. Now, you are ducking my question, which I understand. I gave you the leeway to duck. But if in fact the power of Congress comes down to the question of total abolition, just wiping it out, is it your judgment that we ought to exercise that power?

Mr. JENSEN. As I say, that is a matter that is under consideration. I am not in a position at this moment to answer that question.

Senator MATHIAS. Now you are not only ducking, you are dodging. That was a famous rule in a previous administration: duck, dodge, and weave.

Mr. JENSEN. Well, when I say we have deferred, that is what I mean. We will take a position.

Senator MATHIAS. I understand, and I have placed all of this dialog clearly in the realm of speculation. But one thing I would ask you not to speculate on but to give us a clearly firm prediction: What is the time frame?

Mr. JENSEN. Very short. It will be a short time frame.

Senator MATHIAS. This year?

Mr. JENSEN. Oh, yes, absolutely.

Senator MATHIAS. In other words, before Christmas?

Mr. JENSEN. During this consideration of the exclusionary rule. As you have stated, Mr. Chairman, this is kind of a unique situation where the rule had not been considered for a long time, and

we feel that as a part of that consideration, it is our obligation to give you our opinion conclusively on all these issues.

Senator MATHIAS. What evidence exists, if any, to indicate that the existence of the exclusionary rule is a contributing factor to the national crime rate?

Mr. JENSEN. This gets into the issue of the total complexity of what it is that causes crime. I am not taking a position that the exclusionary rule is a cause of crime. I don't think that anyone can sit back and pick out whether or not a specific rule of court or rule of law is a cause of crime. Our point is that this is a system of criminal justice that requires that the system be fair and workable, and what does happen and we have pointed out is that there are cases where clearly guilty defendants are now acquitted and set free by the operation of the exclusionary rule.

To that extent the system does not work or impose the sanctions it was intended to impose. To that extent it causes crime.

Senator MATHIAS. Do you think it will reduce crime? Is the opposite of that true? Will it reduce crime if you change the rule?

Mr. JENSEN. That is another area of speculation. How we are going to reduce crime is a total strategy that involves any number of issues. I think that any kind of move that we can make to restore respect for our system of justice to make it as credible and rationale and workable as possible will have a positive effect.

Senator MATHIAS. So that is really your bottom line, that restoration of confidence in the system?

Mr. JENSEN. That is a critical issue in this consideration.

Senator MATHIAS. Mr. Jensen, I have a number of other questions, and with your permission I am going to give them to you in writing, and I would ask you to respond for the record and we will hold the record open for that purpose.

Mr. JENSEN. I would be happy to do so.

Senator MATHIAS. Senator DeConcini.

Senator DECONCINI. Thank you, Mr. Chairman.

One question, Mr. Jensen. In the deliberations of the Department of Justice, coming forward with a more definitive position as to maybe abolishing the rule completely, is it under consideration to establish civil tort remedies against the United States for individuals whose fourth amendment guarantees have been violated by law enforcement officials employed by the United States?

Mr. JENSEN. Yes, it is. As I stated, at least the approach in S. 751 includes that, as well as other bills. We would specifically be in favor of a change in the Federal Tort Claims situation to provide that. As I earlier stated, however, we approach it from perhaps a more comprehensive point of view.

S. 751 is only fourth amendment. There are other constitutional torts that are unfortunately involved in this situation that we feel ought to be addressed. But the bottom line is we do feel that fourth amendment constitutional torts ought also to be addressed by that kind of process.

Senator DECONCINI. Is consideration being given for some kind of disciplinary procedure against Federal law enforcement officers who might perpetrate or be involved in fourth amendment violations?

Mr. JENSEN. We have looked at that, and in S. 751 there is a statement to that effect. We have some problems with that in that it appears as though it might set up a separate and distinct hearing process that otherwise does not exist. We feel that there are in place disciplinary procedures that are workable; and we really don't think that there needs to be a whole new construct of a disciplinary process. We think that the disciplinary result is one that Bivens contemplates and that it is available through the normal disciplinary process that exists now.

Senator DECONCINI. It has been my experience as a prosecutor working with a number of different State and local law enforcement agencies that, those disciplinary processes, if they are in existence, are not used or used at a bare minimum. What I hear you saying is that maybe there ought to be more emphasis on educating law enforcement officials of the significance of violating the fourth amendment.

Mr. JENSEN. I frankly agree with you on the latter part even more forcefully than the first. I think there has to be a heavy commitment of local police departments and prosecutors to have a continuing education of what the rule is. We have to know what the rule is day by day by day. One of the problems with discipline, if I may, that comes up, if you look at the *Robbins* case in California, the *Robbins* case was just decided in 1981 and the search took place in 1975. So you are not going to be able to impose any discipline until you have gone through that total track. So it really is difficult in those situations to come up with appropriate ways of doing it.

Senator DECONCINI. Now, if that is the position of the Justice Department regarding education, what actions, if any, is the Justice Department doing now toward Federal law enforcement officials regarding abusive conduct in this area, or do you anticipate doing something in the near future?

Mr. JENSEN. There are already training programs that are in existence. They have been ongoing. There have been training programs such as those run by the FBI that deal directly with this.

Senator DECONCINI. Would you consider that the Federal law enforcement officials are well trained in this area?

Mr. JENSEN. Yes, I would, which is not to say that there is not room for improvement. I came from an area where we had almost an instantaneous relationship back to judicial decisions, and I think we could probably improve that in the federal system where we could give a shorter turnaround for keeping investigative personnel more aware of, as I say, day by day what the law is. I think there is room to improve.

Senator DECONCINI. Do you think we should consider making available some assistance to local law enforcement agencies attempting to educate their law enforcement officials in this area?

Mr. JENSEN. Yes, I think so. However, I think it varies, of course, across the country. My experience in California was that local law enforcement agencies were very heavily into training and so were local prosecutors. It may differ from place to place, but I think that it ought to be clearly in place throughout the whole country, and if there are areas where we can provide assistance, we can.

Senator DECONCINI. It wouldn't offend you or the Department of Justice if, within obvious monetary constraints, the Federal Department of Justice or some agency were involved in disseminating education and encouraging local law enforcement?

Mr. JENSEN. It doesn't offend me at all. I think it can be plugged into normal kinds of processes and the normal system. They are in place now and they are going to be significantly strengthened; coordinating committees throughout the country that will deal with issues that are operational as well as training issues.

Senator DECONCINI. Thank you, Mr. Chairman.

Thank you, Mr. Jensen.

Senator MATHIAS. Thank you very much.

The committee has now the privilege and great pleasure of hearing from the attorney general of Maryland. Mr. Sachs is not only the chief law enforcement officer of the Free State of Maryland, but he has represented the United States in the U.S. courts. He has had a distinguished career as a lawyer and we are delighted to have him here.

General, it is a personal pleasure for me to welcome you.

STATEMENT OF STEPHEN H. SACHS, ATTORNEY GENERAL, STATE OF MARYLAND, ACCOMPANIED BY DEBORAH HANDEL, CHIEF, CRIMINAL APPEALS DIVISION

Mr. SACHS. Thank you very much, Mr. Chairman. I appreciate very much being here, and I would like to introduce to the subcommittee, if I may, Ms. Deborah Handel who is the chief of our Criminal Appeals Division and whose interest in these matters is significant and whose help to me has been substantial.

Senator MATHIAS. We are happy to have her here. If she would care to join you at the witness table.

Mr. SACHS. Thank you very much. Let me just say, Mr. Chairman, at the outset that I certainly share the views of Mr. Jensen and the Department of Justice that it is desirable and important in this country that we increase the public's respect for law.

However, I disagree with Mr. Jensen and with the Department in that I think we would increase it better if we were to be faithful with the constitutional requirements, particularly those in the Bill of Rights. Because I think that to abandon those requirements, to water them down and dilute them is the surest way to undercut the public's respect for law.

And I can't resist another observation at the outset, which is that precisely the reason that there has been the education and training and sophistication increasing all the time of the police in this country, national and State, is because of the existence of the exclusionary rule, which denies the fruits of illegal or substandard conduct to prosecutors and to police.

I am not going to read, Mr. Chairman, my qualifications or so-called qualifications to be here, except to say that—

Senator MATHIAS. The committee doesn't need to be reassured on that subject.

Mr. SACHS. Except to say, Mr. Chairman, that I have spent most of my professional life in the cause of law enforcement. I see myself very much as a child of law enforcement, and I think by

almost no stretch of the imagination, despite my views here today, could I be considered for membership in what a key Presidential adviser recently called, I hope in an overwrought moment, the criminal's lobby.

Senator MATHIAS. I don't know that I could accept your description of yourself as the child of law enforcement. I view you as a very mature individual.

Mr. SACHS. Well, "father" perhaps, Senator, but "mother" I doubt.

I also believe, Mr. Chairman, that the exclusionary rule, the remedy for a fourth amendment violation, which suppresses its fruits and denies Government the benefit of its unconstitutional conduct, is sound in theory and effective in practice.

The rule, Mr. Chairman, is also very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do very much about it. It is vulnerable to attack because its values are abstract, while its price is tangible. It frequently excludes hard evidence, the truth, from trial. It appears to reward the undeserving criminal whom it sometimes frees because the constable blundered. It seems to many to give aid and comfort only to the enemy in the war on crime, and it makes almost no sense to citizens fed up with crime and impatient with legal technicalities who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has also become a favorite whipping boy of anticrime rhetoricians.

My purpose today is simply to bear witness to what my own experience and study have taught me.

First, the rule is of constitutional origin and beyond the reach of Congress;

Second, it results in freeing guilty criminals in a relatively small proportion of cases;

Third, it definitely deters police and prosecutor violations of constitutional rights to privacy;

Fourth, it manifests our refusal to stoop to conquer, to convict lawbreakers by relying on official lawlessness, which is a vital demonstration, to my mind, of our commitment to the rule of law.

CONSTITUTIONAL ORIGIN OF EXCLUSIONARY RULE

Mr. Chairman, there will be others who will appear before the committee to testify, I am sure—persons much more learned than I—about the constitutional underpinnings of the rule, but I do set out in my statement and will simply allude to here my belief that the rule has constitutional underpinnings, that beginning with *Weeks* and most particularly in the language of Mr. Justice Clark in *Mapp* against *Ohio*, the rule is part and parcel of the fourth amendment. It matters not that it does not say explicitly in the fourth amendment that you shall exclude evidence unconstitutionally seized. It rarely says with the explicitness that we seek things like that in the Constitution of the United States.

But the Supreme Court has interpreted the rule to, in my judgment, make it a rule of constitutional dimension. While Congress can attempt to pass legislation that affects the impact of the exclu-

sionary rule, it will, in my judgment, be found to be an unconstitutional exercise when and if the issue should reach the Supreme Court of the United States.

I would not be so flippant as to tell the committee it should go fishing, but that was the Chairman's phrase, not mine. And if that's the advice the committee wants to follow, I would only state from a constitutional point of view I think it might be appropriate.

Senator MATHIAS. I would hesitate to ask you what else you think we should do. [Laughter.]

IMPACT OF EXCLUSION

Mr. SACHS. There is another reason, however, Mr. Chairman, for the suggestion that there is an overwrought quality to the bills that are before the committee at the present time. These bills, of course, can only affect, and any legislation as best I can see that Congress can pass assuming it is constitutional in the first place, will affect only Federal criminal trials in the Federal criminal courts.

But the only study that I think has been done of the impact of the exclusionary rule on the administration of justice in the Federal courts was done several years ago, or a year or so ago, by the Comptroller General of the United States, determining in a survey of close to 3,000 cases in 38 U.S. attorneys' offices throughout the country, the extent to which motions which were made were granted trying to suppress evidence on fourth amendment grounds; how many acquittals or dismissals took place and how many cases were declined prosecution because of fourth amendment grounds.

Of all the cases presented to those Federal prosecutors for prosecution, only 0.4 percent were declined by prosecutors because of fourth amendment search and seizure problems. And evidence was excluded at trial as a result of fourth amendment motions in only 1.3 percent of the cases.

It is my judgment, Mr. Chairman, that the claims that the exclusionary rule, at least in Federal courts, will release hordes of criminals and does release hordes of criminals are greatly exaggerated.

DETERRENCE

Next, Mr. Chairman, and members of the committee, I want to address the issue of whether or not the rule deters. There are lots of studies that have attempted to measure it. As Mr. Jensen indicated and as the Supreme Court has found, those studies are, by and large, inconclusive. I cannot offer statistical studies on the deterrent effect of the rule, but what I can offer is my testimony that I have watched the rule deter routinely throughout my years as a prosecutor.

When an assistant U.S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a staleness problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girlfriend's apartment, or that he should apply for a search warrant from a magistrate and not rely on the consent of the suspect's kid

sister to search his home—in all those circumstances, Mr. Chairman, the rule is working.

The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court. Episodes like these are commonplace. It was part of the routine of every Federal prosecutor with whom I have worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when fourth amendment concerns arise.

I strongly suspect that scenes like these are repeated daily throughout Federal law enforcement and on homicide, narcotics, and gambling squads in cities throughout the country.

In at least three Maryland jurisdictions, for example, prosecutors are on 24-hour call to field search and seizure questions presented by police officers. And these contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects.

But in the heat of the chase and the absence of effective sanction, I believe that we would define those rights, to put it mildly, somewhat narrowly. Questions of adequate identification and staleness and the needs for a warrant all would be answered differently by unchecked law enforcers than by judges. We are, after all, hunters stalking crime. It is simply too much to ask for objectivity in the midst of the hunt when the quarry is in sight, and that is precisely what the warrant requirement of the fourth amendment is all about.

Exclusion from evidence is almost, certainly in my judgment, the only deterrent in the vast majority of unconstitutional intrusions. Even critics of the rule are quick to acknowledge the severe limitations of police self-discipline or court damage actions as deterrents when crime-fighting police officers are in the dark. In rare cases involving especially gross misconduct, a police disciplinary board or a court or a jury in a damage action might, just might, impose sanctions, at least if the victim of the trespass is innocent and the police misconduct truly outrageous.

But most of the suppression cases do not deal with such outrageous conduct. They deal with undramatic fourth amendment concerns—the sufficiency of probable cause, whether exigent circumstances excuse the necessity of a warrant, whether there is sufficient corroboration of the tip of an anonymous informer. All of these requirements are not the stuff to move police disciplinary boards or judges and juries accustomed to awarding damages on the basis of fault. What they are are constitutional rules of the road and only the suppression sanction, the exclusionary rule, is going to force prosecutors and police to obey them.

There are many people who would object to these requirements as unnecessary impediments in the path of aggressive law enforcement. I disagree. These requirements are the way we attempt to reach a balance between the claims of public safety and the claims of personal freedom in a nation that believes that Government, including police, should not have limitless power.

Now, there are those who would say that my experience and my analysis suffer because I do not address the uniformed officer on

patrol or the agent on the street who is called upon to make split-second arrest and search decisions and who measures his success by arrests made, not convictions won. And there is force to this criticism.

I do not doubt that the rule works less well in street encounters. But here, too, the rule is at work because of the enormous increase in police training and education about constitutional rights directly attributable to the exclusion sanction.

You have already heard about the great deal of attention paid to these matters in the Federal Government, and at pages 11, 12 and, I think, 13 of my statement, I outline what they are.

In my State, Maryland, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years.

A former executive director of the 15-year-old Maryland Police Training Commission attributes the increase in quality and quantity of training and education directly to the need to adjust to the exclusionary rule. *Mapp*, as he put it, has had "very positive effects." And at page 13 we list some of the more dramatic of the effects that have taken place in the last 20 years in Maryland due, in my judgment, Mr. Chairman, precisely because of the exclusionary rule.

If police officers on the beat are, in Justice Rehnquist's words, "the foot soldiers of the society's defense of ordered liberty," then it is well that they know the basis of what "ordered liberty" entails. These courses are not going to convert police officers into law professors, thank God, but they almost certainly have acquainted a vast army of them with the elements of the right of privacy. The result, I am positive, is that today's police officer is more likely than ever to do an effective job of securing valid, legal evidence without violating the law and the rights of American citizens.

This is the sense of deterrence that, with all respect to the Department of Justice, they have not addressed. It is the sense of deterrence which applies not only to the individual police officer who talks to an assistant State's attorney and consults before he goes off on some search; it is the total effect of years of training and years of experience and years of indoctrination and years of sensitivity to the rights of the people in the community that have resulted in faithfulness to the Constitution that, in my judgment, would not otherwise exist.

GOOD FAITH—S. 101

I would like briefly, Mr. Chairman, to turn to the concept of good faith, and the Senate bill 101, which is one of the bills before the committee.

Probably the most current exponent of the good faith test is the Attorney General's task force to which reference has been made and we now understand that it is endorsed by the Department of Justice of the United States. I would like to say this about the good-faith test.

As a number of commentators have pointed out, the good-faith test puts a premium on police ignorance. If the good faith loophole is established, a new layer of pretrial hearings in every fourth

amendment case will test the reasonableness of the police officer's ignorance of the fourth amendment's commands. Often, very often I fear given the antipathy of some judges toward the rule and public pressure to jettison it, the officer's ignorance will be found to have been reasonable. And each time unconstitutional behavior is thus excused, each time it is excused, Mr. Chairman, the benchmarks of fourth amendment compliance will drop another notch.

It is worth asking what impact such a good-faith exemption will have on the courses and classroom hours police will devote to the constitutional limitations on their profession if, in fact, it really does pay to be ignorant.

Introduction of the reasonable good-faith test would, I fear, depress fourth amendment compliance to the level of our tolerance for the lowest standards of the least informed officer, and there would be no incentive to do any better.

It is an appealing phrase, good faith, and it sounds benign and it sounds wholesome. But I ask whether we apply that test to any other law violator. There is no good-faith exemption to violation of income tax laws. There is no good-faith exemption to the violation of rules of the road that I know of, and to apply it to violations of constitutional right, it seems to me, cheapens those rights considerably.

Senate bill 101, with all respect to its sponsor, in my judgment, goes beyond even the good-faith test. Under it, for reasons I think perceived by the Department of Justice in its comments, only the grossest police misconduct would result in the exclusion of evidence.

S. 751

With respect to Senate bill 751, it is, in my judgment, Mr. Chairman, an open invitation to official lawlessness. If it were law, a Federal officer could violate the constitution essentially risk free. If he engages in an unconstitutional search, even of an innocent suspect and no matter how egregious, he risks no personal liability and no personal expense. Section 2694 of the bill appears to preclude other damage actions, like *Bivens*, by victims of unlawful Federal searches. The officer may, in the discretion of his employing agency, be subject to appropriate discipline if his agency finds that he did not act in good faith. The agency's risk as an insurer of its employees' misconduct is limited to \$25,000 in actual and punitive damages.

S. 751 may even prompt agencies to encourage constitutional shortcuts by their employees. An agency that now may be required to spend time and money to put together a lawful case including probable cause to search for incriminating evidence, might well seek to economize by accepting the fixed risk of a \$25,000 fine assuming suit is even brought. The agency might well conclude that the cost of doing business would be cheap at twice the price. Thus are important constitutional protections demeaned and budget cutting brought to unaccustomed lengths.

Supplementing the deterrent effect of the exclusionary rule in Federal court by a tort remedy against the United States makes sense. It would open an avenue of compensation for victims of Gov-

ernment misconduct not afforded by the suppression remedy. But to abolish the exclusionary rule and to replace it with a system that would fund unconstitutional conduct is to stand the fourth amendment on its head.

CONCLUSION

And in conclusion, Mr. Chairman, I would just like to say, at the risk of betraying a personal belief or two, this.

It is sometimes said that the exclusionary rule breeds disrespect for the law because it suppresses the truth and permits crime to go unpunished. I believe that abolition of the rule would be far more destructive of respect for law. When an American court admits evidence obtained in violation of the Constitution, it is not merely permitting the truth to be heard. It is inescapably condoning, validating, even welcoming, the illegality that produced it. It becomes a part of that illegality. It paints a portrait of hypocrisy in a nation that professes to believe in the rule of law and whose courts, in the words of Madison, are to be the great bulwarks and guardians of our liberties. And it is dangerous. As Justice Brandeis put it:

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Law enforcement, uniquely, Mr. Chairman, needs public trust and respect for its authority in order to do its job effectively and safely. Official lawlessness destroys that trust, poisons police relations with the citizens they serve, and thus adds immeasurably to law enforcement's burdens.

It is easy to salute the liberties of the Bill of Rights in the abstract. But these freedoms have a price. It is difficult to remember, but we must never forget that we cannot apply them selectively. Only insofar as we permit their effective exercise by the guilty will they remain strong protections for the innocent. Rights atrophy with disuse. They must be used not only in times of calm but in times of passion and fear as well.

If I may end, Mr. Chairman, with a word from a play, you will recall the play, "A Man for All Seasons," an account of the martyrdom of Saint Thomas More in which More warns a zealot against cutting a great road through the law to get after the Devil.

"When the last law was down, and the Devil turned round on you, where would you hide," he asked, "the laws all being flat?" "Yes," More adds, "I'd give the Devil benefit of law" for my own safety's sake."

In this time of great passion about crime, Mr. Chairman and members of the committee, we should be extremely careful, for our own safety's sake, not to let our zeal to "get after the Devil" lead us to cut a great road through the Bill of Rights.

Thank you very much, Mr. Chairman, for the opportunity to speak to you, and I would be delighted to answer any questions you may have.

Senator MATHIAS. General, your appearance here recalls to my mind the days when I represented your department, the Maryland State Law Department, in the Court of Appeals of Maryland on a number of criminal cases.

Most of them involved the numbers racket and the evidence usually that had obtained the convictions which were appealed, the evidence consisted largely of the numbers tickets and the question as to where they were found. So this hearing has a certain nostalgic appeal for me.

Mr. SACHS. Of course, Mr. Chairman, the State itself is now in the numbers business in Maryland. [Laughter.]

Senator MATHIAS. That must allow you to go fishing.

Mr. SACHS. Things have changed, Mr. Chairman.

Senator MATHIAS. But let me ask you this. Professor Kamisar has argued that much of the criticism against the exclusionary rule is mistaken, misdirected. And he contends that the criticisms really ought to be directed forthrightly at the fourth amendment itself, and not at the rule. And he cites the distinguished Senator from New York, Mr. Wagner, who spoke in 1938 at a constitutional convention in the State of New York, who said:

All the arguments which, to the effect that the exclusionary rule would handicap law enforcement—all the arguments seemed to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself. It is the law, not the sanction, which imposes limits on the operation of the police.

If the law is obeyed as it should be and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

Mr. SACHS. Of course, that's true.

Senator MATHIAS. Well, should our attention be focused on an amendment of the fourth amendment rather than fiddling around with the exclusionary rule?

Mr. SACHS. Well, let me say first of all I agree with Professor Kamisar's analysis. He raises a very important point, Senator, with respect to whether your attention should be devoted to the fourth amendment.

I, of course, believe, as I suspect the committee would as well, that it is certainly beyond the congressional power to amend, so to speak, the fourth amendment. But because, and precisely because, the fourth amendment is a rule of reason, precisely because it speaks to reasonableness, I do believe that a congressional judgment about what reasonableness is, congressional judgments about the role of split-second, on-the-spot decisions by police officers, the Congress speaking, so to speak, as perhaps not the conscience of the community but as a spokesman for the sense of reasonableness, ought to commend itself to the Supreme Court and I think might be a very valuable contribution.

The Supreme Court, it is often overlooked, I think, has, in the search and seizure cases, frequently addressed with a large degree of practicality the issues of police-citizen contacts on the spot; the stop and frisk, protection-of-police kinds of notions. It is unfortunately frequently lower Federal and State courts who have been guilty, in my judgment, of some of the hypertechnical excesses that are frequently complained of.

But to answer your question first, yes, the Congress I think does have a role and a very important one in speaking to what reason-

ableness should be all about. The Supreme Court in many decisions talks about reasonableness and states that it is not a technical requirement; it ought to be practical, we ought to think about what the policeman is doing.

But the point that Kamisar makes I think is incontrovertible. If the police had, in fact—you see, the problem with the exclusionary rule is that it has very bad public relations, as Kamisar points out. It has bad public relations because we see it operate after the fact. The fellow is in court, the defendant. He is probably guilty, we know. The evidence is probative, we know.

But what we often overlook is that if the police had followed—and I am not talking about the marginal cases—the parade of horrors that are presented as to how can a policeman ever be expected to understand when the court divides five-four, and there are some extraordinary cases like that. But by and large, we are talking about relatively clear violations.

And if the police had, in fact, been trained to or decided to, whatever, follow the fourth amendment in the first place, that very criminal would not have been caught, and may I say, should not have been caught if, in fact, it meant violating the Constitution to do so.

And so one of the problems the exclusionary rule suffers from, and one of the reasons it is, as I say, the whipping boy in these days of great concern about crime is because it has, in Kamisar's phrase, awfully bad public relations. And there are not too many folks who point that out, I think.

Senator MATHIAS. You raised the question of reasonableness. A little later this month we will celebrate in this country the bicentennial of the battle of Yorktown, and that recalls to mind that all of this really arose as part of the revolutionary complaints in the Thirteen American Colonies against the officers of the British Crown that were guilty of unreasonable searches and seizures.

Now, in those days it must have seemed fairly simple. An agent of the King or of the royal governor would simply come in and physically take possession of papers and documents, personal property of various kinds, and there was an overt act of violence against the privacy of the property and perhaps the person of one of the English colonists. And in the view of the patriots who supported the Revolution, that was violative of the constitutional rights of a British subject.

But what about the situation today? In your position as the chief law enforcement officer of Maryland, do you find that it is a more complex problem than it was in those days? Has technology altered the scope of the question?

Mr. SACHS. Without any question it has, Senator, of course it has. The degrees of possible intrusion are much greater.

I say this as one who argued successfully, I am happy to say, in the Supreme Court the constitutionality of the police use of a pen register without the use of a warrant. It was held there, as I recall, that the Constitution does not require the getting of a warrant for the police to record the numbers called, not the content of the call.

But in the course of that case I became very much aware, very startled. And this Congress has certainly been concerned in the recent years especially with the enormous degrees of technological

and electronic intrusion that are possible. So the problem is more complex. The crime problem is more complex and more severe.

Senator MATHIAS. Criminals have technology too.

Mr. SACHS. Indeed. But there are some basic old principles, Mr. Chairman, in my judgment, and I hope and trust in that of the committee and those who consider these matters, that ought not get amended and ought not get bent and ought not get diluted in order to accommodate what is perceived as a present crisis.

There are lots of things to do to fight crime in this country in my judgment far more profoundly important, and I mention some of them in my statement, than tinkering with constitutional protections.

Senator MATHIAS. I think that is one aspect that we have to consider, that technology has changed, that this is not just a question of a British soldier in a redcoat rifling through a desk drawer. It is a much more sophisticated problem.

Mr. SACHS. That is true, Mr. Chairman. But what has not changed is the notion of fairness. And if I could have one more moment to elaborate, it is often asked by critics—and I think Mr. Schlesinger, Professor Schlesinger, will say so or has said so in his writings—"What is wrong with this country, why are we so out of step?"

Other civilized countries, it is said, Canada, France, England, and all the other places that most people would agree have strong democratic traditions, do not exclude such evidence. And thus the question arises, Well, what is wrong with us?

Time, I daresay, does not permit for a long colloquy on all the differences in this continental, multiracial country that is the blend of so many different traditions. But one thing that I think is very different and one very important point to be made is that courts in this country are not just umpires. They are not just monitors in a kind of a contest to see what the truth is.

They really are symbols of values, and when they make rules and when they exclude evidence they are not just calling balls and strikes. It seems to me they are perceived by the people in this country as demonstrating certain values that are thought to be very important. And when they dilute them, when they ignore them, it seems to me it undercuts very much our confidence in the law.

Senator MATHIAS. Well, of course, this is one area in which it might not be bad to be different.

Mr. SACHS. I believe that, Mr. Chairman.

Senator MATHIAS. And that would be consistent with Justice Brennan's dissent in the *Calandra* case. He said there that:

Uppermost in the minds of the framers of the rule was not the rule's deterrent effect, but the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

Mr. SACHS. I certainly agree with Mr. Justice Brennan.

Senator MATHIAS. Senator DeConcini?

Senator DeCONCINI. Thank you, Mr. Chairman.

Mr. Sachs, your outstanding reputation as a prosecutor, U.S. attorney, and assistant U.S. attorney precedes you here. I want you

to know that I, as a former prosecutor, have heard about your fine work as U.S. attorney of Maryland and I have a great respect for your ability as a prosecutor.

Mr. SACHS. Thank you, Senator.

Senator DeCONCINI. Thank you for testifying on this issue. Even though you and I may disagree on it I have the deepest respect for your position.

You made a reference in your statement that would contradict a statement I am going to make. That statement is that statistics suggest that a substantial number of otherwise guilty criminals escape likely conviction because of application of the exclusionary rule. Do you think that statement is inaccurate or do you think that there is some validity to that general statement?

Mr. SACHS. Well, I suppose we could debate what the word "substantial" means. Unquestionably, in a great many cases in which the exclusionary rule operates to exclude evidence there are convictions not obtained by virtue of that fact. Thus there are people who are probably guilty who do not get convicted. I do believe that to be the case.

The question is, however, is that, as you say, substantial. Is it of the epidemic proportions that is sometimes claimed by people who are critics of the rule? The hardest evidence I know on the entire subject and the only evidence, with all respect, Senator, that I think is relevant to the bill before this committee, namely with respect to the Federal courts, the only evidence is the Comptroller General's study of several years ago, demonstrates that 0.4 percent of all the cases presented in 38 offices in 2 months, some 3,000 cases, 0.4 were declined by prosecutors to the agent saying, no, this is a lousy case because of search and seizure.

And let us assume that those are guilty people in those cases, as I will. And 1.3 percent dismissed. Now, they are not very—let us assume every one of those is a guilty person who goes free because of the exclusionary rule. I do not find those a price that one cannot pay for the effectuation of constitutional rights.

Senator DeCONCINI. I am somewhat familiar with that particular study. A study I have read recently is a 1969 study of two Chicago circuit courts which showed that during 12 sample days, 457 defendants were prosecuted for narcotics violations and 188 for carrying concealed weapons; 34 percent of the narcotics prosecutions and 36 percent of the weapons prosecutions were met with motions to suppress or motions to exclude the evidence. Of these, some 97 percent of the narcotic motions and 68 percent of the weapons motions were granted.

In 1979 in three branches of the Chicago circuit court, 2,060 defendants were prosecuted for narcotic violations and 929 for carrying concealed weapons; 43 percent of the narcotic prosecutions and 36 percent of the weapons prosecutions were met with motions to suppress evidence; 84 percent of the narcotic motions and 62 percent of the weapons motions were granted.

In the Comptroller General's study that you mentioned, some 33 percent, if I am correct, went ahead and moved for exclusion. This is the same study you referred to; 33 percent of the defendants who went to trial filed fourth amendment suppression motions.

So it seems to me that there must be a horrendous amount of violations out there, just absolutely epidemic on the part of law enforcement, to have the statistics I just cited to you from the circuit court of Chicago alone. I do not know that the police are that bad. I know they make mistakes, and when they do they ought to be dealt with severely. But I doubt whether it is that bad even in Chicago.

Mr. SACHS. Well, neither one of us, I suppose, has to run for office in Illinois. So perhaps we can be completely candid.

Senator MATHIAS. I would not hedge your future.

Mr. SACHS. Or the Senator's.

Senator, I certainly do not agree with the thrust of what you said. I know, I think, the source for your other figures. But again, let me repeat, we are talking the Federal figures and the only relevant Federal figures I know of, and you have mentioned, are the ones in the Comptroller General study.

The figures are what they are. The fact that 33 percent made motions—I used to be a defense lawyer too. I used to have more motions than the twist when I was a defense lawyer. The fact that they made motions is not, it seems to me, determinative.

You also, I think, in 1969 and 1971, are those State studies, and I cannot pretend I have all the answers to those. But I think we have been seeing a gradual increase in the level of State court, State police, local police compliance with the fourth amendment because of *Mapp*. If you read the literature, as I am sure you have, when you read the literature again I am sure you will see again that the outrage with which *Mapp* was greeted by police people in some places around the country. You would think that the fourth amendment had just been invented.

What it really suggested was that there was a fourth amendment they were not paying much attention to, and I think that some of these early figures may betray that.

But having said all that, Senator, let me just finish the answer by saying this to you: The logic proves too much, because if the goal and the only goal is to stop crime, I am quite certain that I could put, we could put a SWAT team down in a major metropolitan center anyplace in this country and do a series of general searches in any 12-block radius and pick up an awful lot of crime and perhaps deter some. I daresay we would.

The question of course is, are we prepared to do that. And the answer I am quite sure is no. But I think it makes the point that, while measuring effects is always an important thing to do and the Supreme Court Justices are always going to be mindful of that as well, I do not think the argument from statistics can affect the devotion we should have to the fourth amendment.

Senator DeCONCINI. I have not yet read the statement of the National District Attorneys Association, but I understand they are going to, if not support one of the measures before us, at least come out in favor of abolishing the rule or making substantial changes to it.

Do the U.S. district attorneys—and I know the answer to this question—have any position on this issue to your knowledge?

Mr. SACHS. I cannot speak to the U.S. attorneys, I just do not know.

Senator DECONCINI. Do they have an organization independent of their own Justice Department group?

Mr. SACHS. Mr. Jensen would know this better than I. There is, as I recall, something called an association or a group of U.S. attorneys. When I was there there was no such thing, but I understand they formed a union in the administration that followed the one that I was a part of. And how strong that union is I do not know, but I think there is such an entity. But I cannot speak to that.

There is, of course, the National Association of Attorneys General, which has not as yet taken a position on these bills. I have been engaged over the last year or so in discussions relating to these bills. I do not think I exaggerate to say that there is substantial sentiment in the association in favor of limitation of the rule. I think it is fair to say that I am not a majority voice. I do not think I am being reckless in suggesting that I am not a majority voice among my colleagues throughout the country.

But yes, many of them feel very strongly that the rule is an impediment to effective law enforcement.

Senator DECONCINI. Do you know, Mr. Sachs, if the Association of Attorneys General will come forward with a position on this subject matter or any of this legislation?

Mr. SACHS. I cannot speak with certainty about it. We are having a meeting in December in New Orleans, and there is a committee on this matter.

Senator DECONCINI. Well, that is a good place to go in December.

Mr. SACHS. Well, I cannot speak with certainty. I think it will be on the agenda, and I will be saying the same thing there.

Senator DECONCINI. Mr. Sachs, thank you for your testimony.

Mr. Chairman, I would welcome the opportunity for further discussion it with this outstanding prosecutor and attorney general, but I realize that the time is short.

Mr. SACHS. Thank you, Mr. Chairman and Senator.

Senator MATHIAS. It has been a great privilege to have you here before us. Thank you.

[The prepared statement of Attorney General Sachs follows:]

PREPARED STATEMENT OF STEPHEN H. SACHS, ATTORNEY GENERAL OF MARYLAND

My name is Stephen H. Sachs. I am Attorney General of Maryland. I am grateful to Senator Mathias and the members of the Senate Judiciary Subcommittee on Criminal Law for the opportunity to share my views on the exclusionary rule's impact on the administration of criminal justice and to comment on the provisions of S.101 and S.751. I urge the Subcommittee to reject those bills and to be extremely skeptical of the many proposals, now very much in vogue, to modify a rule which has barred unconstitutionally seized evidence from federal criminal trials for almost 70 years. I make that recommendation because after 20 years' experience with the rule, half of it as a prosecutor, I continue to believe that the rule works in the best interests of professional law enforcement and every American citizen.

I would like to say a preliminary word about my professional background and some of my views on the operation of the criminal justice system generally. I am a 1960 graduate of the Yale Law School. I clerked on the United States Court of Appeals for the District of Columbia Circuit. I served as an Assistant United States Attorney for Maryland from 1961 to 1964 and as the United States Attorney for Maryland from 1967 to 1970. I was elected Attorney General in 1978. I spent the intervening years in private practice in Baltimore, much of it centering on criminal litigation. I have lectured and written on criminal justice topics and have taught law school courses in criminal procedure and trial practice.

My years as a federal and state prosecutor have involved me personally and directly -- as trial and appellate lawyer, investigating attorney or active supervisor -- in the detection and prosecution of crime ranging from murder, rape and narcotics offenses to tax evasion, fraud and bribery. Like most law

enforcement officials, I share our citizens' alarm and anger at the dreadful impact of crime in our society and want to strengthen law enforcement's capabilities. I agree with many of the recommendations made to Attorney General Smith by his Task Force On Violent Crime, including those recommendations which would facilitate pretrial detention of some demonstrably dangerous criminals and curb collateral review of state convictions by federal courts. And I deplore the hypertechnical excess with which some courts have interpreted the substance of the Fourth Amendment's guarantees against unreasonable searches and seizures. In short, I don't think that I qualify for membership in what a key presidential advisor recently called, I hope in an overwrought moment, "the criminals' lobby".

What I also believe, however, is that the exclusionary rule, the remedy for a Fourth Amendment violation which suppresses its fruits and denies government the benefit of its unconstitutional conduct, is sound in theory and effective in practice.

The rule is also very fragile, especially in today's atmosphere of understandable public outrage at crime and at our perceived inability to do much about it. It is vulnerable to attack because its values are abstract while its price is tangible. It frequently excludes hard evidence, the truth, from trial. It appears to reward the undeserving criminal, whom it sometimes frees because "the constable blundered". It seems to give aid and comfort only to the enemy in the war on crime. It makes almost no sense to citizens fed up with crime and impatient with legal "technicalities" who want to believe that crime would disappear if only courts would stop coddling criminals. That is why the rule, although it has plenty of responsible critics, has become a favorite whipping boy of anticrime rhetoricians.

My purpose today is simply to bear witness to what my own experience and study have taught me:

- (1) the rule is of constitutional origin and beyond the reach of Congress;

(2) it results in freeing guilty criminals in a relatively small proportion of cases;

(3) it definitely deters police and prosecutor violations of constitutional rights to privacy;

(4) it manifests our refusal to stoop to conquer, to convict lawbreakers by relying on official lawlessness, a vital demonstration of our commitment to the rule of law.

There should be many urgent priorities in this country's crime fighting agenda, among them the overhaul of a dilapidated corrections system, creation of victim compensation and offender restitution programs, upgrading of the status and compensation of law enforcement officers and reduction of the length and breadth of the criminal appeal process. I respectfully suggest that attempts to downgrade important constitutional rights should not be among them.

II

I believe that the exclusionary rule is a rule of constitutional origin which only the Supreme Court, as part of its process of constitutional adjudication, can alter. Others more scholarly than I will undoubtedly appear before the Subcommittee to address this issue, but I would like to outline my analysis.

The rule was first announced in Weeks v. United States, 232 U.S. 383 (1914), where Justice Day focused on the constitutional necessity of effectively enforcing the Fourth Amendment:

"The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, ... This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to

unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U.S. at 391-92 (emphasis added)

The Supreme Court emphatically established the exclusionary rule's constitutional roots when it made the rule applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961):

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

* * * *

"Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." 367 U.S. at 655, 657, (emphasis added).¹

Even Chief Justice Burger, no friend of the exclusionary principle, acknowledges that the rule is of constitutional dimension. He has suggested that Congress could create a remedy for unlawful police conduct which, if it works, might be found by the Court to be a satisfactory substitute for the judicial rule. But he has carefully noted that such an alternative would only be relevant to a judicial determination by the Court that it was an effective deterrent to Fourth Amendment violations. Bivens v. Six Unknown Agents, 403 U.S. 388, 415 (1971) (dissenting opinion).

While the Court has occasionally limited the reach of the rule, it has not retreated from its constitutional base. The rule may be a "judicially created remedy", U.S. v. Calandra, 414 U.S. 338, 348 (1974), but it has clear constitutional underpinnings.

III

The most severe indictment of the rule and, in the present

climate of fear about crime the most damaging one, is that it releases hordes of dangerous and demonstrably guilty criminals to prey upon society.²

I believe that such claims are greatly exaggerated. In cases where unconstitutionally seized evidence is indispensable to conviction, convictions are obviously lost. Police and prosecutors will be frustrated. In the occasional celebrated case, the public will be angry. But a recent study done by the Comptroller General of the United States proves that the rule operates to free federal criminal suspects in only a tiny percentage of cases.³ The Comptroller General studied the rule's operation in 2,804 cases in 38 representative United States Attorneys Offices throughout the country during the period July 1 through August 31, 1978. Of all the cases presented to those federal prosecutors for prosecution, only 0.4 percent were declined by the prosecutors because of Fourth Amendment search and seizure problems. Evidence was excluded at trial as a result of Fourth Amendment motions in only 1.3 percent of the cases. And over 50% of the few defendants whose suppression motions were granted in whole or in part were nonetheless convicted. This data is powerful proof that at least in federal prosecutions --- the only cases, it should be remembered, to which S.101 and S.751 would apply --- the spectre of muggers, rapists and dope pushers set loose by the rule is the product of rhetoric that is not in touch with reality.

To my knowledge, no comparable study of state and local experience has been conducted. Based on my personal observation and my contacts with other Maryland prosecutors, however, I would expect the impact of the rule on state prosecutions to be somewhat greater, but still fall far short of justifying the claims of the alarmists. I believe a fair summary of the Maryland experience to be that the rule has small effect on declinations by prosecutors, or loss at trial, in almost all categories of crime, including violent crime, except for a

significantly higher incidence of suppression motions granted in drug possession cases resulting from spontaneous street encounters. As Professor LaFave has written in his treatise on search and seizure: "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed."⁴

There is an even more fundamental response to the claim that the exclusionary rule frees criminals. As pointed out by Professor Kamisar, we tend to examine the legality of a search only after it has occurred -- and after incriminating evidence has been discovered -- and therefore lose sight of the fact that if the police had obeyed the Fourth Amendment they would not have the evidence at all. Thus, it is the guarantee of the Fourth Amendment, a cornerstone of our personal liberty, which constricts the police. The rule only serves to put the police in the same position they would have been in had they done in the first place what the Constitution commanded. As Kamisar asks: "If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it has violated the Constitution?"⁵

IV

A fundamental assumption underlying creation of the rule was the judicial belief that it deters official lawlessness and "compel[s] respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). Critics charge that the rule fails in this primary purpose and point to various empirical studies which, they argue, demonstrate that the rule is ineffective as a deterrent. The studies have been thoroughly dissected elsewhere. I have read

most of them and agree with Justice Powell's conclusion that they are "inconclusive".⁶

I can't offer statistical studies on the deterrent effect of the rule. What I can offer, however, is my testimony that I have watched the rule deter, routinely, throughout my years as a prosecutor. When an Assistant United States Attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better "make" on the car; or that he has a "staleness" problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girl friend's apartment; or that he should apply for a search warrant from a magistrate and not rely on the "consent" of the suspect's kid sister to search his home -- the rule is working. The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court.

Episodes like these are commonplace. It was part of the routine of every federal prosecutor with whom I worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when Fourth Amendment concerns arise. I strongly suspect that scenes like these are repeated daily throughout federal law enforcement and on homicide, narcotics and gambling squads in cities throughout the country. In at least 3 Maryland jurisdictions, for example, prosecutors are on twenty-four hour call to field search and seizure questions presented by police officers.

These contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects. But in the heat of the chase, and in the absence of effective sanction, I believe that we would define those rights, to put it

mildly, somewhat narrowly. Questions of adequate identification, "staleness" of information and the need for a warrant will be answered differently by unchecked law enforcers than by judges. We are, after all, hunters stalking crime. It is simply too much to ask for objectivity in the midst of the hunt, especially when the quarry is in sight. This is precisely what the warrant requirement of the Fourth Amendment is about. As Justice Jackson once put it:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Exclusion from evidence is almost certainly the only effective deterrent in the vast majority of unconstitutional intrusions. Even critics of the rule are quick to acknowledge the severe limitations of police self-discipline or court damage actions as deterrents when crime fighting police officers are in the dock.⁷ In rare cases involving especially gross misconduct, a police disciplinary board or a court or jury in a damage action might, might, impose sanctions, at least if the victim of the trespass is innocent and the police misconduct truly outrageous.

But most of the suppression cases do not deal with such outrageous conduct. They deal with undramatic Fourth Amendment concerns -- the sufficiency of "probable cause" in a given case, whether "exigent circumstances" excuse the necessity of a warrant, whether there is sufficient corroboration of the tip of an anonymous informer to justify intrusion into a suspect's apartment. These requirements are not the stuff to move police disciplinary boards, or judges and juries accustomed to awarding damages on the basis of "fault". But they are our constitutional rules of the road and only the suppression sanction, the

exclusionary rule, will force prosecutors and police to obey them.

There are many who would object to these requirements as unnecessary impediments in the path of aggressive law enforcement. I disagree. These requirements are the way we attempt to reach a balance between the claims of public safety and the claims of personal freedom in a nation that believes that government, including police, should not have limitless power. And only by demonstrating that our courts will not permit their violation can we underscore their importance or enforce them at all.

My views about the deterrence inherent in the close police-prosecution contacts with which I am most familiar are subject to the criticism that they do not describe the rule's impact on the uniformed officer on patrol or the agent on the street who is called upon to make split-second arrest and search decisions and who measures his success by arrests made, not convictions won.

There is force to this criticism. I don't doubt that the rule works less well in street encounters. But here, too, the rule is at work because of the enormous increase in police training and education about constitutional rights directly attributable to the exclusion sanction.

Federal agencies, subjected to the exclusionary rule since 1914, have traditionally devoted substantial time to such training. For example, in the fifteen week FBI training program at its Training Academy in Quantico, Virginia, approximately 67 hours are devoted to legal instruction, the majority of which deal with constitutional law. In addition, agents spend another 30 hours in practical application of these constitutional law principles (e.g., practice arrests, searches, interrogations, applications for search warrants). Each FBI field office has a legal advisor to keep field agents abreast of current changes in the law.

All other new federal law enforcement agents undergo a consolidated law enforcement criminal investigation training session at Glencoe, Georgia for eight-weeks, devoting 70 hours to constitutional law and a minimum of 21 hours to search and seizure law. Following the initial training program, agents in various federal agencies receive additional training in their own service, some of which involves additional, relevant search and seizure course work.

Customs Department agents continue training for approximately five more weeks, spending 10 to 12 hours on additional search and seizure problems with particular emphasis on those problems relating to customs agents, e.g., border searches. The Drug Enforcement Administration emphasizes search and seizure law in an additional 24 hours and focuses on its particular need, airport searches. The Secret Service provides 16 hours of additional constitutional law training. Refresher courses, in-service training, manuals with up-to-date information are all commonplace today.

In my state, Mapp has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. A former executive director of the 15 year old Maryland Police Training Commission attributes the increase in quality and quantity of training and education directly to the need to adjust to the exclusionary rule. Mapp, as he put it, has had "very positive effects." Some of the more striking improvements include:

- much longer training periods for new officers, especially courses about constitutional rights.
- many local jurisdictions have more than doubled the training time and now provide over 20 weeks of initial instruction.

- in-service training, virtually nonexistent before, is now emphasized.
- higher calibre of instruction, with some courses taught by law-trained college professors.
- training geared to practical situations such as stop and frisk exercises.
- testing constitutional law knowledge on promotional exams.

If police officers on the beat are, in Justice Rehnquist's words, "the foot soldiers of society's defense of ordered liberty",⁸ it is well that they know the basics of what "ordered liberty" entails. These courses will not convert police officers into law professors. Thank heavens! But they almost certainly have acquainted a vast army of them with the elements of the right of privacy. The result, I am positive, is that today's police officer is more likely than ever to do an effective job of securing valid, legal evidence without violating the law and the rights of American citizens. The rule does, indeed, "encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." Stone v. Powell, *supra*, 428 U.S. at 492.

V

"Good Faith" -- S.101

Critics of the rule frequently complain that courts exclude illegally seized evidence even though the officers believed in

good faith that their conduct was lawful. As the final report of the Attorney General's Task Force On Violent Crime puts it:

"[A]n officer may in good faith rely on a duly authorized search or arrest warrant or on a statute that is later found to be unconstitutional; or an officer may make a reasonable interpretation of a statute which a court later determines to be inconsistent with the legislative intent; or an officer may reasonably and in good faith conclude that a particular set of facts and circumstances gives rise to probable cause, but a court later concludes otherwise. In such circumstances we do not comprehend how the deterrent purpose of the exclusionary rule is served by exclusion of the evidence seized."⁹

The Task Force proposes that "in general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution."

S.101 reflects this point of view, although it seems to admit illegally seized evidence that even the "reasonable, good faith" rule would bar.

As several commentators have pointed out, the "good faith" test puts a premium on "police ignorance".¹⁰ If the "good faith" loophole is established, a new layer of pretrial hearings in every Fourth Amendment case will test the "reasonableness" of the police officer's ignorance of the Fourth Amendment's commands.

Often (very often, given the antipathy of some judges toward the rule and public pressure to jettison it) the officer's ignorance will be found to have been "reasonable". And each time unconstitutional behavior is thus excused, the bench marks of Fourth Amendment compliance will drop another notch. It is worth asking what impact such an exemption will have on the courses and classroom hours police will devote to the constitutional limitations on their profession if, in fact, it pays to be ignorant. Introduction of the "reasonable good faith" test would, I fear, depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer. And there would be no incentive to do better.

S.101 goes beyond the good faith test. It would admit evidence "obtained in violation of the Fourth Amendment to the Constitution" unless a federal district court finds such violation to have been either "intentional" or "substantial". In determining "substantiality" a court is invited to consider whether the violation was "reckless", the extent to which privacy was invaded, the deterrent impact of exclusion on similar violations and whether the item seized would have been discovered anyway, all considerations which suggest admission of the evidence even in the absence of reasonable good faith. Under S.101 only the grossest of police misconduct would result in exclusion of evidence.

Advocates of the "good faith" -- "substantiality" modification of the rule argue that police officers should not be penalized because they cannot predict what appellate judges, months or years later, will say the police should have done at the time of the search. This argument seriously confuses interpretation of the substantive requirements of the Fourth Amendment with the propriety of the exclusionary remedy when a violation is found. Judges are sometimes wrong and hyper-technical in their interpretation of the Fourth Amendment. They sometimes forget that the Fourth Amendment proscribes only "unreasonable" searches and seizures.¹¹ Probable cause is supposed to turn on "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act", Brinegar v. United States, 338 U.S. 160, 175 (1949). Scores of Supreme Court pronouncements make it clear that practical, common sense standards, including appreciation of the alternatives available to officers at the scene of crimes, are the guideposts for interpreting the Fourth Amendment's standard of reasonableness.

When courts fail to apply these standards of reasonableness, application of the exclusionary rule works to keep out evidence that should have been admitted. But once a violation of the

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constitutional commands of the Fourth Amendment is found, it would do serious violence to the deterrent purposes and societal values of the rule to say that police conduct is unconstitutional but "we'll let it in anyway". The cure for such wrong interpretations of the Fourth Amendment is better, sounder and more practical judges. One does not have to agree with every court that ever found a search unconstitutional under the Fourth Amendment in order to believe, as I do, that the exclusionary rule is a sound remedy.

S.751

S.751, which abolishes the exclusionary rule and replaces it with an exclusive tort remedy against the United States for damages resulting from a search conducted in violation of the Fourth Amendment, is an open invitation to official lawlessness. If it were law, a federal officer could violate the Constitution essentially risk-free. If he engages in an unconstitutional search, even of an innocent suspect and no matter how egregious, he risks no personal liability and no personal expense. Section 2694 appears to preclude other damage actions by victims of unlawful federal searches. The officer may "in the discretion" of his employing agency be subject to "appropriate discipline" if his agency finds that he did not act in good faith. The agency's "risk" as an insurer of its employees' misconduct is limited to \$25,000 in actual and punitive damages.

S.751 may even prompt agencies to encourage constitutional short-cuts by their employees. An agency that now may be required to spend time and money to put together a lawful case, including probable cause to search for incriminating evidence, might well seek to economize by accepting the fixed risk of a \$25,000 "fine" assuming suit is even brought. (The bill, incl-

dentially, would limit the recovery of one found guilty as a result of evidence turned up in an illegal search to actual physical or property damage.) The agency might well conclude that the cost of doing business would be cheap at twice the price. Thus are important constitutional protections demeaned; and budget cutting brought to unaccustomed lengths.

Supplementing the deterrent effect of the exclusionary rule in federal court by a tort remedy against the United States makes sense. It would open an avenue of compensation for innocent victims of government misconduct not afforded by the suppression remedy. But to abolish the exclusionary rule and to replace it with a system that would fund unconstitutional conduct is to stand the Fourth Amendment on its head.

VI

It is sometimes said that the exclusionary rule breeds disrespect for the law because it suppresses the truth and permits crime to go unpunished.

I believe that abolition of the rule would be far more destructive of respect for law. When an American court admits evidence obtained in violation of the Constitution it is not merely permitting the truth to be heard. It is inescapably condoning, validating, even welcoming, the illegality that produced it. It becomes part of that illegality. It paints a portrait of hypocrisy in a nation that professes to believe in the rule of law and whose courts, in the words of Madison, are to be the great "bulwarks" and "guardians" of our liberties.¹² And it is dangerous. As Justice Brandeis put it:

"In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For

good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution." Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting opinion).

Law enforcement, uniquely, needs public trust and respect for its authority in order to do its job effectively and safely. Official lawlessness destroys that trust, poisons police relations with the citizens they serve and thus adds immeasurably to law enforcement's burdens.¹³

It is easy to salute the liberties of the Bill of Rights in the abstract. But these freedoms have a price. It is difficult to remember, but we must never forget, that we cannot apply them selectively. Only insofar as we permit their effective exercise by the guilty will they remain strong protections for the innocent. Rights atrophy with disuse. They must be used not only in times of calm but in times of passion and fear as well.

In the play "A Man for All Seasons", an account of the martyrdom of Saint Thomas More, More warns a zealot against "cut[ting] a great road through the law to get after the Devil".

"When the last law was down, and the Devil turned round on you, where would you hide," he asks, "the laws all being flat?". "Yes," More adds, "I'd give the Devil benefit of law, for my own safety's sake."¹⁴

In this time of great passion about crime we should be extremely careful, for our own safety's sake, not to let our zeal to "get after the Devil" lead us to cut a great road through the Bill of Rights.

NOTES

1. As pointed out by Justice Powell in Stone v. Powell, 428 U.S. 465, 484 n.21 (1976), the majority in Mapp did not agree on the precise constitutional peg for the exclusionary rule:

"Only four Justices adopted the view that the Fourth Amendment itself requires the exclusion of unconstitutionally seized evidence in state criminal trials. . . . Mr. Justice Black adhered to his view that the Fourth Amendment, standing alone, was not sufficient, . . . , but concluded that, when the Fourth Amendment is considered in conjunction with the Fifth Amendment ban against compelled self-incrimination, a constitutional basis emerges for requiring exclusion." (citations omitted).

2. See, e.g., Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 JUDICATURE 214, 215 (1978).
3. Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report of the Comptroller General, April 19, 1979).
4. W. LaFave, Search and Seizure §1.2 n.9 (1981 Supplement).
5. Y. Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5, 13 (1979).
6. Stone v. Powell, supra, 428 U.S. at 492 n.32; United States v. Janis, 428 U.S. 433, 449-53 (1976) ("[E]ach empirical study on the subject, in its own way, appears to be flawed.") See also, Canon, The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police, 62 JUDICATURE 398 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That it is a Deterrent to Police?, 62 JUDICATURE 404 (1979); S. Schlesinger, Exclusionary Injustice (1977); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1969-70); Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5, 35-39 (1979); Wilkey, A Call for Alternatives to the Exclusionary Rule, 62 JUDICATURE 351 (1979).
7. Bivens, supra, 403 U.S. at 421-22 (Burger, C.J., dissenting); S. Schlesinger, Exclusionary Injustice 77ff.
8. Roberts v. Louisiana, 431 U.S. 633, 647 (1977) (Rehnquist, J., dissenting).
9. U.S. Department of Justice, Attorney General's Task Force on Violent Crime (Final Report, August 17, 1981) 55.
10. Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. at 35 n.15; United States v. Williams, 622 F.2d 830, 850 n.4 (5th Cir. 1980) (Rubin, J., concurring specially).
11. See, e.g., Collonade v. Bannister, 607 P.2d 987 (Colo.), rev'd per curiam, ___ U.S. ___, 101 S.Ct. 42 (1980) (policeman who lawfully stops a car and seizes equipment and occupants must get a warrant to search the car); People v. Krivda, 96 Cal. Eptr. 62, 486 P.2d 1262 (Cal. 1971) (householder has a "reasonable expectation of privacy" in the contents of trash bags put out for pickup by the trash collector.); State v. Ramos, 378 So.2d 1294 (Fla. App. 1980) (reversing lower court suppression ruling that a police officer cannot "stop and frisk" a suspect who was wearing long and heavy clothing on a hot June day in Florida with a bulge that looked like a firearm.)
12. 1 Annals of Cong 439 (1789).
13. Lankford v. Gelston, 364 F.2d 197, 204 (4th Cir. 1966).
14. Robert Bolt, "A Man For All Seasons" Act I, scene 6.

Senator MATHIAS. Our final witness of the day is Prof. Steven R. Schlesinger of the Department of Politics of Catholic University. Professor Schlesinger, I again offer you the option of submitting your statement, which will be reported in full as if read, and briefing it for us so that we can get on to some discussion.

STATEMENT OF PROF. STEVEN R. SCHLESINGER, DEPARTMENT OF POLITICS, CATHOLIC UNIVERSITY

Mr. SCHLESINGER. Thank you, Mr. Chairman. My name is Steven Schlesinger. I am associate professor of politics at the Catholic University of America, and I have written a book, a monograph, and a number of law review articles dealing with the exclusionary rule. I thank the subcommittee and its chairman, Senator Mathias, for this opportunity to contribute to the subcommittee's deliberations on the exclusionary rule.

As you suggested, Mr. Chairman, I will try to summarize briefly my prepared statement so that we can get on to the discussion.

INTRODUCTION

The Justices of the U.S. Supreme Court have advanced two primary public policy justifications for the rule. First, it is said to deter improper police behavior because police will have no reason to gather evidence which cannot be used in court. Second, it is said to guarantee that, should the State invade the privacy of individuals during the course of a search and seizure, the fruits of that invasion will prove useless to the State in its prosecution. In other words, this second justification portrays the rule as a partial protection of the privacy of the victims of illegal searches and seizures. Both of these arguments, the deterrence rationale first and the privacy rationale, I argue, are unsatisfactory and inadequate.

PRIVACY

As to the privacy rationale, if criminal activity is a public concern, and it seems clear that it is, then when the police either legally or illegally find evidence of such activity, it is not an invasion of the individual's privacy to use what the police have found against him in a criminal proceeding. Specifically, since criminal activity is not private, a location is not private if activities of great public interest, crimes, are committed or concealed there. Thus the police cannot be denied access to the location of a crime on the ground of protection of privacy. What I am saying, in other words, is that whether a place is private has a great deal to do with what is going on there. A policeman who illegally comes upon a murder or robbery or assault or a drug factory cannot realistically be said to have happened upon a private act or on a location which should be off limits because it should be regarded as private. The legitimate public concern for criminal activity, in short, the public nature of contraband renders the search for and the seizure of that contraband, and that only, a necessary and justifiable police activity on behalf of the public. One could put this argument in another way. A person who uses his home to store dead bodies or a drug factory forfeits what would ordinarily be his right to privacy.

DETERRENCE

As to deterrence, all but one of the seven major studies of the deterrent effect of the rule—those of Dallin Oaks, Michael Ban (two studies), James Spiotto, and two by Bradley Canon (two studies) and the "Columbia Journal of Law and Social Problems," conclude that the rule does not generally deter. The seventh study comes to no definite conclusion about the deterrent effect of the rule. In fact, Prof. Bradley Canon of the University of Kentucky, the staunchest supporter of the rule in the social science community, concludes in his most recent and methodologically sophisticated study that: "The rule has not always or even often worked," and that the data "do not come close to supporting a claim that the rule wholly or largely works."

Let me add here that the position of the Supreme Court majority on the deterrent effectiveness of the rule is clear. In *Stone v. Powell*, (328 U.S. 465 (1976)), the majority of the Supreme Court said that there is an absence of empirical evidence to support the notion that the rule has a deterrent effect.

I appreciate the personal observations of the attorney general of Maryland, but I think that the reason empirical studies are done is precisely to get away from anecdotal material and personal observation. We attempt to generalize our experiences through empirical studies and the empirical studies, I submit in my prepared statement, are, if not conclusive, certainly persuasive.

Senator MATHIAS. That is why we need professors as well as politicians.

Mr. SCHLESINGER. Furthermore, criminal justice literature supplies many reasons for doubting the deterrent effectiveness of the rule:

First, the operative scope of the rule is limited. Only evidence presented at trial, a narrow stage in the criminal process, is excluded. Thus, the rule affects only a small proportion of police activity. Given the extraordinary amount of plea-bargaining in American courts today, the instances in which the rule can be invoked at trial are dramatically reduced.

Second, the impact of the rule falls only indirectly on police. It does not discipline the errant officer. The brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct.

Third, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.

Fourth, trial judges do not often explain to officers why their evidence is excluded. The impact of the rule is limited if the police are not informed of the nature and effect of their wrongdoing.

Fifth, in jurisdictions where prosecutors decline to prosecute cases with substantial search and seizure problems there are relatively few instances in which the rule can be invoked.

And finally, there are some strong indications that the rule even encourages certain forms of police misconduct.

OTHER DISADVANTAGES OF THE RULE

Turning away now from the deterrence problem and toward other disadvantages of the rule, another serious difficulty with the

rule is that a certain number of guilty persons escape conviction because of its operation. Indeed, Oaks' study of motions to suppress in gamblings, narcotics and weapons cases in Chicago indicates that: "In every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks concludes that these proceedings focused almost entirely on evidentiary questions, rather than on the guilt or innocence of the suspect. It is sometimes possible to retry a suspect on the basis of evidence other than that illegally obtained. Often, however, it is not, and persons dangerous to society are released. In relation to the GAO report mentioned by the attorney general of Maryland, I think that three things ought to be said about that report:

First, the general thrust of that report was that not many individuals are released or let go as a result of the exclusionary rule. It seems to me that if even one potentially convictable criminal were let go as a result of an irrational and unsatisfactory rule, that would be too many.

Second, if you look at the actual numbers, the so-called N's as the social scientists would say, involved in that study and not simply at the percentages, I think you will find that the numbers of individuals who are released as a result of the rule go into the hundreds and perhaps the thousands.

And finally, what this committee does and what Congress does ultimately is going to have a tremendous effect on State legislatures and State law enforcement officers. And I think it is generally conceded that State law enforcement officers have a greater problem complying with the rule than do Federal officers, and that what this committee does, what this Congress eventually does, will have a very important impact on State legislatures and State law enforcement. I would suggest that the State level is where the problem is, not so much at the Federal level.

Another difficulty with the rule is that it undermines public respect for the legal and judicial system. One complaint about our legal system is that too many suspects are released on technicalities. In fact, this complaint most often refers to the operation of the exclusionary rule. Thus, far from increasing public respect for the court system in the public mind, the operation of the rule may cause that system to appear dangerously foolish, not only to the disgruntled police officer directly affected by it, but to large segments of the public. Indeed, the public expects from its courts not only adherence to certain standards of due process, but also conviction of the guilty and of course acquittal of the innocent. Under the operation of the exclusionary rule, and I stress this, it gets the former, but in many cases not the latter.

Another difficulty with the rule as it has been applied to the States in accordance with *Mapp v. Ohio* (367 U.S. 643 (1961)), is that it fails to distinguish between more and less serious offenses, and I stress this. Both a gambler and a murderer, having committed crimes of widely differing degrees of gravity, would be given reversals of their convictions because of the illegality of the search and seizure. The operation of the rule frees the criminal without giving any consideration to the danger to which society is exposed by this release. But the law is accustomed to taking into account the seriousness of the alleged crime. Even before the trial is com-

pleted and sentence is pronounced, whether a person may be released at all in the pretrial period and the amount of bail if he is released are determined in part by the seriousness of the crime allegedly committed, although of course, bail is also determined by the probability of his appearing for trial. Thus there is much precedent for applying different standards to crimes of differing degrees of gravity.

Another problem with the rule is that it often excludes the most credible kinds of evidence. Thus it is erroneous to conclude that admissible evidence is the best, most credible evidence, for evidence that is seized in a state of nature has not been prepared by anyone for presentation. Thus, ironically, although that kind of evidence is currently inadmissible because illegally obtained, it may be the most credible evidence available in the proper and just disposition of cases. Thus, application of the exclusionary rule on search and seizure grounds is qualitatively different from other types of exclusions, such as suppression of unreliable confessions, lineup evidence, or eyewitness identification, for in these other areas suppression takes place because of specific doubts we all have as to the reliability of the evidence. In search and seizure the probative value of physical evidence, while hardly in doubt, is too often ignored.

Finally, application of the rule has at least one very harmful side effect. A number of commentators have pointed out that the necessity of excluding obviously probative evidence under the rule has placed increasing pressure on judges to sanction dubious searches and seizures based on dangerously expanded notions of probable cause. Judges feel that they must interpret probable cause expansively in order to admit crucial evidence which they are loathe to suppress. Thus, the exclusionary rule may have the perverse and unintended effect of limiting the scope of privacy contemplated by the fourth amendment.

ALTERNATIVES TO THE EXCLUSIONARY RULE: A PROPOSAL

Let me turn to alternatives to the exclusionary rule. In my book, I suggest that successful alternatives to the rule would involve a combination of two elements. First, discipline of law enforcement officers imposed by an independent review board to which cases of official misconduct would be reported by judges, and I underline that. Instances of official misconduct would also be reported to the review board by victims and by the general public. Let me stress here that many of the referrals to this board would come from the judiciary. Judges would become aware of possible misconduct by law enforcement officials as they preside over trials in which searches and seizures are involved.

I am convinced that serious discipline through independent review boards of some kind would be a much more effective deterrent to illegal action by law enforcement officers than is the exclusionary rule.

The second component of my alternative to the rule would involve an improved civil remedy for innocent victims of illegal searches and seizures. In my prepared statement I have gone into

much more detail on both of these and there is even more detail in my book.

A DUE PROCESS ARGUMENT CONCERNING THE RULE

Let me turn now to a due process argument concerning the rule. Proponents of the exclusionary rule claim that through the enforcement of the rule our courts gain popular respect because they uniformly refuse to accept illegally—

Senator MATHIAS. Let me interrupt for just a moment. The Chair notices that Professor Greenhalgh has been standing in the rear of the room and I want to invite him—this is such a popular hearing, it is standing room only. I want to invite him to come up and sit at the table. [Applause.]

Please continue.

Mr. SCHLESINGER. Thank you, Mr. Chairman.

Proponents of the exclusionary rule claim that through the enforcement of the rule our courts gain popular respect because they uniformly refuse to accept illegally obtained or tainted evidence. The theory seems to be that, were the courts to accept such evidence, they would be condoning the methods used to obtain it. Through their refusal to admit illegally obtained evidence, the argument goes, the courts demonstrate their unswerving commitment to fourth amendment restrictions on search and seizure. Two points should be made concerning this argument.

First, does a court not lose the respect of citizens when, through its enforcement of the exclusionary rule, it implicates itself in the freeing of a suspect in whose case reliable evidence has been obtained indicating that the suspect has committed a serious crime or crimes? Don't the courts lose respect when they implicate themselves in a situation so structured that law enforcement officers feel tremendous pressure to permit perjury?

Second, courts surely have a duty to support fourth amendment rights of due process and fair play, but they also have a duty to pursue the truth, to free the innocent and convict the guilty. Under the exclusionary rule the courts may claim to fulfill only the former duty. Under the system I have proposed the courts to a large extent fulfill both. They clearly express their commitment to fourth amendment search and seizure restrictions through their participation in the process of finding and punishing official misbehavior by law enforcement authorities, and they express a commitment to pursuing the truth by judging evidence solely on the basis of its reliability. One hopes that it is not asking too much that the courts concern themselves not only with the privacy problems raised by the fourth amendment search and seizure clause but also with their obligation fairly to establish guilt or innocence in criminal cases.

THE PATH AWAY FROM THE RULE

Let me turn now to a possible path away from the rule. The exclusionary rule seems to be so deficient and the alternatives sufficiently promising that we should cease clinging to the rule. Indeed, the rule does not in any substantial way do what the alternatives would do, namely, punish offending officers and provide compensa-

tion to innocent victims of illegal law enforcement activity. And the rule has at least one serious liability not attached to the alternatives. It releases otherwise convictable and possibly dangerous persons on society.

The practical problem is, of course, how do we move away from the rule as a monolithic remedy for police misconduct? If the exclusionary rule were simply abandoned without substitute, the police might infer, in the words of Chief Justice Burger, that open season had been declared on criminal suspects.

Chief Justice Burger has suggested, however, that Congress should formulate substitutes, as it did in 1946 with the Federal Tort Claims Act, which provides a form of relief for those with claims against the Federal Government. If such substitutes for the exclusionary rule were successful, the States might then wish to follow the Federal model. I strongly endorse the Chief Justice's call on Congress to formulate substitutes for the rule and I suggest in my testimony what form those substitutes should take.

In discussing the path away from the rule it is very important to remember that the U.S. Supreme Court currently grounds the rule in the policy of deterrence, not in the Constitution itself. I cannot stress this too much. The Supreme Court currently rejects the constitutional grounding of the exclusionary rule and grounds the rule clearly in the nonconstitutional policy of deterrence. Therefore, there is no constitutional bar, according to the Supreme Court, to Congress formulating a substitute for the rule. Since the empirical evidence clearly undermines the deterrence argument for the rule, it is, I think, high time for Congress to put in place those substitutes for the rule about which Chief Justice Burger spoke 10 years ago.

ABOLITION VERSUS MODIFICATION

Finally, let me turn to the Attorney General's Task Force on Violent Crime. The task force has recommended that the rule be applied only in those cases in which a judge finds that a law officer acted in bad faith, that is, when he knew that a search or seizure was in violation of the law.

In addition to the arguments against the exclusionary rule which I made previously in my testimony, there are a number of specific reasons for preferring abolition of the rule to the course recommended by the Attorney General's task force.

First, the task force recommendation provides little or no deterrence for violations deemed by the courts to be in good faith. This fact could encourage a careless attitude on the part of law enforcement officials toward detail and might encourage them to see what can be gotten away with before the courts draw the line on what is an intentional violation.

Second, the task force recommendation virtually guarantees years of trial and appellate litigation focusing on what constitutes good and bad faith violation. The Supreme Court has already made so many fine distinctions in dealing with the question of when police may search and seize that a number of police departments, I'm sorry to have to tell you, have had to employ attorneys to explain the rules to officers.

Senator MATHIAS. Why should a professor be sorry about that?

Mr. SCHLESINGER. Not all of us are interested in drumming up business, Senator Mathias.

The task force recommendation would make fourth amendment law even more impenetrable to officers upon whose understanding of the law the privacy of all of us depends. Courts, and especially the Supreme Court, should be given no encouragement to make more fine distinctions.

Third, the task force recommendation puts a substantial premium on the ignorance of law enforcement officers. In order to render legitimate a search or seizure under the task force's proposal the officer need only convince the judge that he did not know or fully understand the applicable legal requirements. Under the current rules, he must convince the judge that the search was indeed legal. Under the task force's proposal, as I understand it, he would need to convince the judge only that he thought it was legal. Ignorance may not be bliss, but it surely will have its uses in future search and seizure litigation if the task force recommendation becomes law.

As long as the exclusionary rule exists, even in modified form—and this is the fourth and final point—it is unlikely that we will try the kinds of alternatives to the rule that I and others have proposed: Police discipline imposed by an independent review board and a greatly improved civil remedy for innocent victims of illegal searches and seizures.

These alternatives would deter official misconduct, I believe, more effectively than does the rule, would involve none of the costs and disadvantages of the rule discussed earlier, and would belatedly—and this is important—bring some serious redress to the innocent.

Let me conclude. The exclusionary rule is fundamentally unsound. The task force's recommended change in the rule would build an unsatisfactory half-way house between retention and abolition of the rule. Only a final end to the rule will produce the necessary incentive to try serious alternatives. As long as this country, which has adopted a more extensive exclusion policy than any other nation of the world, permits the rule to continue it may well deserve the unhappy consequences of its failure to abolish the rule.

Thank you. I will be happy to answer any questions you might have.

Senator HEFLIN. Professor, I'm sorry. I just came in and I didn't get to hear you. Senator Mathias has prepared some questions that the staff had.

Would you give us any information you have on the frequency with which technical violations of the fourth amendment result in dismissal or termination of a case at any time after arrest?

Mr. SCHLESINGER. I do not have that information and I am not sure if the information exists. For example, the GAO report to which reference has been made, I believe, does not break down violations as to whether they were technical or non-technical. I would be glad to look for the answer to that question. I do not have it currently.

Senator HEFLIN. Are you familiar with the American Bar Association's—well, are you familiar with two studies by the Institute for

Law and Social Research? The American Bar Association cites one of these studies to the effect that the data produced seems to counter the conventional wisdom that Supreme Court decisions cause many arrests to fail because of technicalities.

In fact, in the jurisdiction studied only one homicide arrest was rejected for due process reasons and no rapes were rejected. Have you had a chance to review these studies, and what are your reactions to their findings?

Mr. SCHLESINGER. That study was published a while ago. I did have a chance to look at it at the time it came out. My reaction to that study is somewhat similar to my reaction to the GAO study. That is, it is important to look not only at the percentages but at the actual numbers one can derive from that study. That study, if I remember correctly, indicates that thousands and perhaps tens of thousands of otherwise convictable individuals have to be released by the courts under the operation of the exclusionary rule. So it seems to me if that study proves anything, it proves, rather, that the exclusionary rule has a rather extensive impact and that it leads in many instances, in too many instances, to the release of otherwise convictable individuals.

The hardest evidence that we have on the subject of release of otherwise convictable individuals is the evidence cited, I believe, by Senator DiConcini earlier, namely the evidence about the successful motions to suppress in gambling, weapons and narcotics cases in one municipal court in Chicago. It is worth remembering that in gambling, weapons and narcotics cases, in three courts in Chicago over a 3-month period, 77 suppression motions were granted. This took place in three courts over a 3-month period. I would suggest to you that if this is what is happening in a few courts and if we extrapolate from this information, the exclusionary rule must be having a startling and very disturbing impact on the enforcement of law in this country.

Senator HEFLIN. I believe there are a number of questions that have been prepared. If you would be so kind as to respond in writing to those, we would appreciate it.

Mr. SCHLESINGER. I would be happy to respond in writing, Senator Heflin.

[The prepared statement of Professor Schlesinger follows:]

PREPARED STATEMENT OF PROF. STEVEN R. SCHLESINGER

My name is Steven R. Schlesinger. I am Associate Professor of Politics at The Catholic University of America and have published a book, a monograph and a number of law review articles dealing with the exclusionary rule. I thank the Subcommittee and its Chairman, Senator Mathias, for this opportunity to contribute to the Subcommittee's deliberations on the exclusionary rule.

Introduction

The justices of the United States Supreme Court have advanced two primary public policy justifications for the rule. First, it is said to deter improper police behavior because police will have no reason to gather evidence which cannot be used in a court of law. Second, it is said to guarantee that, should the state invade the privacy of individuals during the course of a search and seizure, the fruits of that invasion will prove useless to the state in its prosecution. In other words, this second justification portrays the rule as a partial protection of the privacy of the victims of illegal searches and seizures, which is said to be guaranteed by the Fourth Amendment search and seizure clause. I will attempt to demonstrate that the rule is not an effective deterrent to police misbehavior and that attempts to justify the rule as an effective protection of privacy are unsatisfactory. In addition, a number of disadvantages of the rule not related to deterrence of privacy will be discussed.

Privacy--The Right To Be Let Alone

With respect to the justification for the rule as a protection of privacy, consider the following two situations: First, assume that the person whose privacy is invaded is innocent of the alleged crime (or some other crime); and second, assume that he is guilty. If he is innocent, the rule offers him little help, remedy or protection--and no compensation, for the police will rarely find any excludable evidence and almost never find excludable evidence sufficient to convict a suspect. In a sense, the illegal search or seizure may benefit the victim by indicating his innocence, at least to the police or prosecutor.

If the suspect on whom an illegal search and seizure has been conducted is in fact in possession of incriminating evidence which is used to convict him, then we must ask whether his privacy has been invaded. To frame the question more precisely, we must ask whether evidence or information concerning a crime is of a public or of a private nature. If it is essentially a public concern, then, as I

shall shortly argue, it is inappropriate to contend that the state has no right to it.

Why is information and evidence concerning a crime more of public than private concern? A certain portion of the criminal act is private--that part which concerns the perpetrator; his motivations, feelings, and in a certain sense the physical act itself. His perception and understanding of the act, its history, and its consequences to him are clearly his private, singular possession. Publicly admitting that he has committed a criminal act is often painful. But this must be balanced against the pain, harm, and difficulty caused the victim of the crime; this is clearly private to the victim, not the perpetrator. These two considerations seem essentially to cancel each other out. What swings the balance in favor of calling the matter more public than private is society's concern that each criminal act is in violation of the established public order, and if the perpetrator goes unpunished or unrehabilitated, he may repeat his crime. In addition, if he could commit his crime with impunity, that fact might encourage others to criminal activity.

If criminal activity is predominantly a public concern, then when the police, either legally or illegally, find evidence of such activity, it is not an invasion of the individual's privacy to use what the police have found against him in a criminal proceeding. Specifically, since criminal activity is not private, a location is not private if activities of great public interest--crimes--are committed or concealed there; thus, the police cannot be denied access to the location of a crime on the ground of protection of privacy. A policeman who illegally came upon a murder, robbery, assault, or drug factory, can not realistically be said to have happened upon a private act or a location which should be off limits to the police because it is regarded as private. The legitimate public concern for criminal activity and, in short, the public nature of contraband, renders the search for and the seizure of that contraband (but that only) a necessary and justifiable police activity on behalf of the public. One could put this argument in another way: a person who uses his home to store dead bodies or a drug factory forfeits what would ordinarily be his right to privacy.

This argument for the admissibility of criminal evidence does not, of course, extend to the fruits of police action which are unrelated to search and seizure. But a legislature, by criminalizing a particular activity, indicates that the legislature regards that activity as having a significant public dimension; if this were not the case, why should public money be spent in dealing with persons who commit the designated crime?

This is not to argue that illegal police searches should not be deterred as effectively as possible. It is to say that when the deterrent breaks down, when the police illegally uncover a crime, murder, rape, drugs, guns, etc.—the evidence they find should be admissible in a court of law.

Furthermore, this argument justifies only the search for, seizure, and use in court of criminal evidence. It does not legitimate the use of excessive physical force by police officers or unnecessary damage to the personal property of the victim or of another person. Disciplinary action against a misbehaving officer is not limited or discouraged, as his search and seizure would be improper regardless of the guilt or innocence of the person searched. The officer commits an illegal search when he violates the rules governing proper searches and seizures (for example, by failing to obtain a search warrant) and because he cannot know whether the suspect is guilty or innocent. Finally, nothing said here limits financial compensation to the innocent victims of illegal searches and seizures for invasion of privacy. However, the guilty victim, the person with whom incriminating evidence is found, should have no such right of recovery, since, as argued above, his right of privacy has not been invaded by the search and seizure.

Deterrence

Professor Bradley Canon describes as a "myth" the claim that empirical studies have shown that the rule is an ineffective deterrent. In fact, the empirical studies, while not conclusive, indicate just that.

In my book, Exclusionary Injustice: The Problem of Illegally Obtained Evidence, I reported primarily on the empirical studies of Dallin Oaks, Michael Ban, James Spiotto, and Bradley Canon. Let us review briefly the findings from each of those studies.

Oaks' 1970 study of law enforcement in Cincinnati between 1956 and 1967 convinced him that:

As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement directed at prosecution.

Ban's two studies of the impact of the rule in Boston and Cincinnati, conducted in the mid-1960's, also tend to confirm the ineffectiveness of the rule. Ban

concludes that the rule showed spotty effectiveness in Boston and almost none in Cincinnati.

Spiotto's study of motions to suppress in Chicago between 1950 and 1971 convinced him that "the deterrent rationale for the rule does not seem to be justified" and that "given the present status of the law and the workings of the exclusionary rule, change is warranted"

While Spiotto's research contains real weaknesses, including a faulty research methodology, his study nonetheless tends to show that in Chicago police misbehavior did not decrease over a 21 year period (1950-1971) during which Illinois had a self-imposed exclusionary rule. Likewise, it did not decrease in the 10 years after the rule was imposed on all the states by the United States Supreme Court. Thus, while Spiotto's research decidedly does not answer the question about how much police illegality there would be without the rule, Chicago's experience lends little credence to Canon's thesis that the rule deters over time.

Professor Canon has admitted that it would be fair to treat these studies of Cincinnati, Boston and Chicago, as well as studies of Washington, D.C. and New York, as an indictment of the rule, if not a conviction. But he maintains that two of his studies, published in 1974 and 1977, support the notion that the rule deters.

His 1974 study attempts to update (to 1973) evidence on the rule's deterrent effect. However, it suffers from so many methodological flaws and other difficulties that its findings are not very useful. In fact, Canon admits that "some errors" appear in this article. For example, much of his study was based on questionnaires which he mailed to police, prosecutors, and public defenders in American cities with populations of more than 100,000. But he received returns on only 47.4 per cent of the questionnaires sent to the police, 35.2 per cent of those sent to prosecutors and 40.2 per cent of those sent to public defenders. Thus, the nature and size of his sample simply do not permit valid generalizations; it was neither random nor representative. Those cities whose search and seizure practices were least in conformity with current law--those whose practices would have negated Canon's thesis about the effectiveness of the rule--would have been the ones least likely to respond to a mailed questionnaire; they would hardly have been anxious to acknowledge or to announce their own failure to obey the law.

Professor Canon nowhere stated which officials filled out the questionnaires. And, generally speaking, there is simply no way of knowing whether the questionnaires were answered truthfully. Anyone trying to give the police a favorable

image might have been less than candid in reporting about police compliance with proper search and seizure procedures.

In addition to the general methodological difficulties in this study, it is important to examine the research methods that Professor Canon used on three of his major topics: numbers of search warrants issued, changes in police search and seizure policies, and successful motions to suppress evidence.

Canon asked both police and prosecutors to estimate the number of search warrants issued annually in their respective cities. He then compared these estimates for the early 1970s with what he admitted were very thin data concerning the number of search warrants issued in the 1950s and 1960s. He concluded, not surprisingly, that there was an increase in the number issued.

Yet the crucial question is why there was such an increase; Canon's own findings on causality seriously undercut his argument for the rule's deterrent effect. The respondents said that 55 per cent of the increase could be attributed to an upsurge in narcotics crimes, 24 per cent to judicial rulings (all judicial rulings on search and seizure, not just those on the exclusionary rule), 22 per cent to more police and better training, and 4 per cent to other causes. While these findings indicate that the exclusionary rule may have had some impact, they hardly make a case for a substantial deterrent effect.

Professor Canon asked the police in the 1974 questionnaire about the extent to which their search and seizure policies had changed since 1967-68 and, again not surprisingly, they reported that the rule had a substantial impact. Yet the problems with Canon's research strategy here are serious. As he admitted, statements of official "headquarters" policy may not conform to actual police practice in the field. Further, Professor Canon conceded that "such statements were sometimes unduly generalized to conform with sparsely worded questionnaire alternatives."

Professor Canon himself noted that "some policies could be misreported so that they would appear to be in conformity with the law." In fact, for the police to have answered Canon's questions in a manner which conflicted with his thesis would have required them to admit that, as a matter of official policy, they broke the law. To put it mildly, the questions themselves contained strong inducements for the police to answer in a manner which confirmed Canon's thesis. Amazingly, some departments did openly admit to policies which seemed to conflict with rulings of the United States Supreme Court--no splendid testimony to the effectiveness of the exclusionary rule.

Finally, Canon's 1974 study sought to cast doubt on Spiotto's research on

successful motions to suppress in Chicago by showing that Chicago was atypical in that it had more successful motions to suppress than the average American city. Though Canon did demonstrate that in this respect Chicago was atypical, he ignored the fundamental question: what effect did imposition of the exclusionary rule have on successful motions to suppress ⁱⁿ Chicago and other American cities? What we really need to know is whether the rule reduced police misbehavior, as we would see from evidence of a decrease over time in successful motions to suppress. Neither Spiotto nor Canon has answered this question.

Professor Canon claims that his more recent study corrects "some errors" in the first, and is more rigorous. In fact, his 1977 study represents one of the most damning pieces of evidence produced so far regarding the rule's ineffectiveness. In his later study, Canon replicated Oaks' 1970 Cincinnati study for 19 other American cities. Summarizing his findings, Canon said the data indicated that the rule "has not always or even often worked," "that Mapp had seemingly little or no impact on the majority of cases," and that the data "do not come close to supporting a claim that the rule wholly or largely works" (emphasis supplied). If these are Canon's own conclusions about the deterrent effect of the rule, he is hardly in a position to criticize those who conclude that, according to the available empirical evidence, the rule is not an effective deterrent against police misbehavior.

Certainly, Professor Canon has not even come close to satisfying the heavy burden of proving the rule's deterrent effectiveness. Such proof is clearly required when deterrence is the primary justification currently used by the Supreme Court for the rule, and when ^{the rule has} _A so many serious costs and disadvantages which I will discuss later in my testimony.

Furthermore, criminal justice literature supplies many reasons for doubting the deterrent effectiveness of the rule. First, the operative scope of the rule is limited—only evidence presented at trial, a narrow stage in the criminal process, is excluded. Thus, the trial affects only a small proportion of police activity. Given the extraordinary amount of plea bargaining in American courts today, the instances in which the rule can be invoked at trial are dramatically reduced.

Second, the impact of the rule falls only indirectly on police—it does not discipline the errant officer; the brunt of the exclusionary rule's effect is actually borne by the prosecution, which generally has little or no power to punish police misconduct. Third, officers whose illegal actions result in loss of convictions may receive the implicit or explicit approval of their superiors.

Fourth, trial judges do not often explain to officers why their evidence is excluded; the impact of the rule is limited if the police are not informed of the nature and effect of their wrongdoing.

Fifth, loss of convictions through exclusion of evidence is not as serious a matter for police as might be thought, since police effectiveness usually is judged by the number of "collars" or arrests, not by the number of convictions. Sixth, in jurisdictions where prosecutors decline to prosecute cases with substantial search and seizure problems, there are relatively few instances in which the rule can be invoked. Seventh, there are some strong indications that the rule even encourages certain forms of police misconduct.

Other Disadvantages of the Rule

Turning away from the deterrence problem and toward other disadvantages of the rule, another serious difficulty with the rule is that a certain number of guilty persons escape conviction because of its operation. Indeed, Oaks' study of motions to suppress in gambling, narcotics, and weapons cases in Chicago indicates that "in every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks concludes that these proceedings focus almost entirely on evidentiary questions, rather than on the guilt or innocence of the suspect. It is sometimes possible to retry a suspect on the basis of evidence other than that illegally obtained; often, however, it is not, and persons dangerous to society are released.

Related to this point is another important difficulty with the rule: it undermines public respect for the legal and judicial system. One complaint about the legal system is that too many suspects are released on technicalities. In fact, this complaint most often refers to the operation of the exclusionary rule. Thus, far from increasing public respect for the court system in the public mind, the operation of the rule may cause that system to appear dangerously foolish, not only to the disgruntled police officers directly affected by it, but to large segments of the public. Indeed, the public expects from its courts both adherence to certain standards of due process and conviction of the guilty (and thus acquittal of the innocent); under the operation of the exclusionary rule, it gets the former but in many cases not the latter.

Another difficulty with the rule as it has been applied to the states in accordance with Mapp v. Ohio is that it fails to distinguish between more and less serious offenses. Both a gambler and a murderer, having committed crimes of widely differing degrees of gravity, would be given reversals of their convictions because of the illegality of a search and seizure. The operation of the rule

freed the criminal without giving any consideration to the danger to which society is exposed by this release. But the law is accustomed to taking into account the seriousness of the alleged crime, even before the trial is completed and sentence is pronounced. Whether a person may be released at all in the pretrial period and the amount of bail, if he is released, are determined in part by the seriousness of the crime allegedly committed (though bail is also determined by the probability of the defendant's appearing for trial). Thus, there is precedent for applying different standards to crimes of differing degrees of gravity.

Also, as noted earlier, the rule does not distinguish between a willful and flagrant violation by an officer, and an exercise, under strained circumstances, of his best judgment, a judgment which, only after several appeals, may be held by a perhaps divided appellate court to have been improper. The issues which appellate decisions resolve are both controversial and difficult, as evidenced by courts sharply divided on the issue of what is a reasonable search and seizure. After all, if appellate judges are not sure about the legality of an officer's action after long consideration of a written record, it is asking a great deal of the officer that he judge the matter correctly in a few moments. Nor can judges be oblivious to the fact that their opinions sometimes lack that kind of helpful guidance which will aid a law enforcement officer in the actual performance of his duty. Police officers should not be deterred from exercising "reasonable judgment," though that judgment may not represent the final judgment of the appellate courts as to proper behavior in that situation. In the same vein, the rule does not distinguish harmless errors of judgment which work no serious injustice and which do not seriously deprive the suspect of his rights, from the flagrant violations of the Fourth Amendment such as those seen in Mapp v. Ohio or Rochin v. California which result in serious deprivations of rights. As Chief Justice Burger says in Bivens v. Six Unknown Named Agents: "... society has a right to expect rationally graded responses to police misconduct--depending on its seriousness--rather than the universal 'capital punishment' we inflict on any and all evidence when police error is shown in its acquisition."

Another problem with the rule is that it often excludes the most credible kinds of evidence. Thus, it is erroneous to link "legal" evidence with the best, most credible kinds of evidence; for evidence that is seized, perhaps illegally, in a "state of nature" has most often not been "prepared" by anyone for presentation as evidence in a court of law and thus, ironically, though it is presently inadmissible because illegally obtained, may be the most credible evidence available to aid in a proper and just disposition of cases. Thus, application of the

exclusionary rule on search and seizure grounds is qualitatively different from other types of exclusion such as suppression of unreliable confessions, line-up evidence, or eyewitness identification, for in these other areas suppression takes place because of specific doubts as to the reliability of the evidence. In search and seizure, the probative value of physical evidence, while hardly in doubt, is often ignored.

Finally, application of the rule has two clearly harmful side effects. First, the rule intensifies plea bargaining because prosecutors, who fear suppression of important evidence at trial, may be willing to negotiate regarding the seriousness of the charge or sentencing recommendations rather than risk dismissal. In addition, a number of commentators have pointed out that the necessity of excluding obviously probative evidence under the rule has placed increasing pressure on judges to sanction dubious searches and seizures based on dangerously expanded notions of probable cause. Judges feel they must interpret probable cause expansively in order to admit crucial evidence. Thus, the exclusionary rule may have the perverse and unintended effect of limiting the scope of privacy contemplated by the Fourth Amendment.

Alternatives to the Exclusionary Rule: A Proposal

Discussion of alternatives to the exclusionary rule must begin with the objectives to be achieved through their use. These are the deterrence of police misbehavior through identification and discipline of offending official(s), a better system than we have at present for compensating the innocent victims of illegal searches and seizures, and conviction of the guilty--a result conspicuously lacking under the rule. These objectives require separate proceedings, a disciplinary proceeding against the offending police officer for deterrence and a civil-action proceeding for damages for compensation. Before discussing these in detail below, a few preliminary points should be made. The guilty victim has no claim to compensation for deprivation of privacy since his privacy, as argued before, has not been invaded. However, while the guilty victim would not be allowed to claim this kind of compensation for the invasion of Fourth Amendment rights, he would still have a civil cause of action if the police do unnecessary violence to his person or damage to his property; for although by his criminal activity he loses his right to privacy, he clearly retains other rights of person and property. Of course, we must discipline the offending officer, be the suspect guilty or innocent, because the officer has no way of knowing before he commits the illegal search and seizure whether the suspect is guilty or innocent,

and because he has violated the rules of search and seizure.

What follows is my proposal for an alternative to the exclusionary rule which, I argue, would accomplish the proper objectives of the rule better than does the rule itself. Later in my testimony, a due process argument for the exclusionary rule will be discussed and, finally, some thoughts will be advanced as to how we may move away from the rule as a remedy against police misbehavior.

The Independent Review Board

As to discipline of the offending officer, it is clear that prosecutors cannot be relied upon to institute proceedings against offending officers, because they rely heavily on a good relationship with the police in order to carry out their duties. Thus, disciplinary action must be initiated and meted out from some other source. One possible source of such discipline would be the judiciary, aided by an independent review board.

A hearing would be held (separately from the criminal trial of the victim of the search and seizure) before an independent review board which would investigate the nature and severity of the officer's misconduct. It would assess an appropriate punishment ranging from a fine to permanent severance from the police force. The board would take into account the record of the offending official, perhaps being more lenient to first offenders. Furthermore, evidence that the officer acted in good faith (without knowledge of wrongdoing) or evidence that he used reasonable force would be considered. At the review board hearing, there would need to be due process protections for the suspect official, including representation by counsel; a special "prosecutor", entirely separate from the police or prosecutor's office, would have to be appointed in order to prevent any conflict-of-interest problems from arising with the "regular" prosecutor. This hearing would be disciplinary in nature, not criminal, but an officer might, in some instances, face additional criminal liability.

If a trial judge believed that there were evidence of illegal official behavior (regardless of the outcome of the trial), he could order such a hearing to be held. Under such a system, the judge must be particularly alert during testimony to the possibility of illegal behavior by officials, since defense counsel would not have the incentive of a suppression motion to bring forward illegal behavior. The judge must be given discretion to ask questions concerning how evidence was obtained in order to make sure that he has enough information to recommend, where necessary, a hearing on police misconduct. In addition to referral of possible misconduct by the judiciary, a citizen who is

an innocent victim of illegal search and seizure, but who is never brought to trial involving this search, may report his complaint directly to the review board for investigation. Some jurisdictions might even wish to allow suspects, whether convicted or acquitted, to bring their own complaints directly to the board, though (because of anger at the police) this could lead to the filing of substantial numbers of less than meritorious complaints. Such a separate disciplinary hearing would provide an independent forum for investigation of police misconduct, unlike the present system in which police conduct is scrutinized by the judge as one of the numerous issues raised at trial. Such a proceeding, unlike the situation of a judge at trial, can give the misconduct question undivided attention and may well afford more time than a trial to resolve allegations of police misconduct.

Legislative bodies may wish to consider awarding a minimal, but automatic, compensation to the successful complainant as an incentive to bring the complaint; in doing this, however, the problem of encouraging less than meritorious complaints must be considered. Or, as an alternative method of encouraging victims to file complaints, a legislature may wish to allow admission to some degree of the results of the disciplinary hearing in a civil proceeding, though the problem here is that admission of such evidence may be prejudicial.

The functions set out above could be well accomplished by an independent review board made up of citizens, judges, law officers and any other groups whose representation may be desirable. The success of the plan depends on careful composition of the board with a view toward representing differing interests; methods of choosing members of the board could vary from place to place. Board members not on the police force will help to provide public and independent scrutiny of police work and will avoid the pitfalls of governmental self-scrutiny, so well illustrated in the recent Watergate and CIA revelations. In short, the "public members" will help to insure a certain responsiveness on the part of the police to the wishes of the community.

A board would be preferable to an exclusion hearing before a judge for two important reasons. First, as noted above, a board would have more time and resources available for investigating the facts of an alleged misbehavior than would normally be available to a judge while a trial is in progress. Second, a board would have the capacity to investigate the possibility that any of the offending officer's superiors had encouraged or ordered him to act as he did, and to take appropriate punitive action where such a pattern is found.

This proposed system would have the advantage of being paid for by the state and it would not need to depend upon the prosecutor or the possibly indigent victim of alleged misbehavior to initiate or sustain proceedings, but would, in most instances, be initiated by the judiciary. In some cases, the punishments meted out by the board might not be sufficiently severe, but it must be remembered that, under the exclusionary rule, it is extremely rare that direct sanctions are imposed on offending officers at all.

The Civil Remedy

In addition to police discipline, the innocent victim should have a means by which to collect compensation for an illegal search and seizure, and to point out official misbehavior. The potential for substantial "penalty compensation"—an amount large enough to make the filing of the suit and its attendant responsibilities worthwhile—would go far to correct the problem of insufficient incentive for counsel to point out official misbehavior.

Specifically, I suggest a statutory civil action with provision for the award of monetary compensation, the amount depending on the gravity of the misbehavior (but with a minimum amount to be awarded in the event that any violation is found). Such an action would allow innocent victims to recover a basic compensatory amount plus counsel's fees without any showing of specific damage to the victim or flagrant violation by the officer. The only proof necessary would be a showing that the victim's Fourth Amendment rights had been violated; the greater the invasion of Fourth Amendment rights, the higher the compensation, the seriousness of the invasion, and thus the amount of compensation, would be measured by the amount of mental or physical suffering and inconvenience caused a victim of improper procedure, as well as the degree to which an officer violated clear rules governing proper searches and seizures. There are now in existence state common law causes of action under which victims may recover damages, but civil actions are rarely instituted (and even more rarely won) because it is necessary to show either substantial harm to the victim (for compensatory damages) or punitive damages. Winning the proposed civil suit would be easier because no such showing would be necessary. This plan would provide an economic incentive for victims and for lawyers to bring to public attention cases of official misconduct, as well as provide an avenue for compensation. Victims of illegal searches and seizures would be encouraged to bring suit because the regularized procedure suggested here, designed precisely for such victims, would help to overcome reluctance to sue the police. Under existing institutional arrangements,

free legal counsel could be provided for indigent persons who wish to bring this type of action.

From where should the money come to pay the victim if he wins the proposed statutory civil action? I believe it must come from the public treasury of whatever unit of government is involved. If the amounts awarded were considerable enough, superior officers would be discouraged from "making it worthwhile" (through increased pay or promotion) for subordinates to effect illegal searches and seizures. If the public were required to pay for such police escapades in the form of substantial damages taken from general tax revenues, the public would take a dim view of such police activity; predictably, corrective pressure would be brought to bear on the police. Also, law enforcement officers would hardly be overjoyed, were public money to be awarded to criminal suspects. It is worth considering whether the plaintiff should be permitted to collect damages directly from the errant officer, since the threat of such damages would serve, at least in some instances, as a deterrent against official misbehavior. However, individual liability of the officer must not be so imposing that it prevents him from acting where action is necessary. In any event, the errant officer would be subject to discipline imposed by the independent review board.

An Argument for the Proposal As a Whole

It is not possible to elaborate all the details of these proposals here, for many of these must be worked out in practice; nor is it possible to answer all possible objections to this kind of proposal. Nevertheless, the preceding proposals are submitted as a method by which we can move away from the difficulties and shortcomings of the exclusionary rule. As the legal literature makes clear, plans like the ones reviewed have been employed only rarely, and even then there was no real incentive to make them work, since most of the states, prior to Mapp, had not experienced the great costs of the exclusionary rule--the alternative to the kind of plan proposed here. Ironically, there is the other side of the coin, namely, that the Mapp decision has largely removed from Congress and from the states the incentive to deal with illegal search and seizure by means other than suppression. As Oaks points out: "By a peculiar form of federal preemption, the Mapp decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule. Thus, The President's Crime Commission Task Force Report on the Police observed that the police admini-

strator is ambivalent about the degree of his responsibility for controlling improper law enforcement behavior by his personnel"

The present system of exclusion does not deter police misbehavior, nor does it provide compensation to the innocent: it simply frees many who, we have argued, have no legitimate claim to that freedom on the basis of invasion of privacy. The recommendations outlined above are intended to move us closer to a system which deters misconduct and compensates those who deserve compensation. There are obvious difficulties with the scheme proposed here which, like any system, will not deal properly with all violations, but at least a substantial number of officers could be disciplined and a substantial number of innocent victims of illegal procedures could be compensated. This is more than one can say for the present system of exclusion.

A Due Process Argument Concerning the Rule

Proponents of the exclusionary rule claim that, through enforcement of the rule, our courts gain popular respect because they uniformly refuse to accept illegally obtained, "tainted" evidence; the theory seems to be that, were the courts to accept such evidence, they would be condoning the methods used to obtain it. Through their refusal to admit illegally obtained evidence, the argument goes, the courts demonstrate their unswerving commitment to Fourth Amendment restrictions on search and seizure. This sense of commitment is communicated to police, causing them to respect the judicial system.

Two points must be made concerning this argument. First, does a court not lose the respect of citizens when, through its enforcement of the exclusionary rule, it implicates itself in the freeing of a suspect in whose case reliable evidence has been obtained, albeit improperly, indicating that the suspect has committed a serious crime or crimes? Do the courts not lose respect when they implicate themselves in a situation so structured that law enforcement officers feel tremendous pressure to commit perjury?

Second, courts surely have a duty to support Fourth Amendment rights, due process, and fair play, but they also have a duty to pursue the truth--to free the innocent and convict the guilty. Under the exclusionary rule, the courts may claim to fulfill only the former duty. Under the system proposed above, the courts to a large extent fulfill both: they clearly express their commitment to Fourth Amendment search and seizure restrictions through their participation in the process of finding and punishing official misbehavior by law enforcement authorities, and they express their commitment to pursuing the truth by judging

evidence solely on the basis of its reliability. One hopes it is not asking too much that our courts concern themselves not only with the privacy problems raised by the Fourth Amendment search and seizure clause but also with their general obligation fairly establish guilt or innocence in criminal cases.

Also, in a real sense, courts would tolerate government wrongdoing (and the "benefits" that government derives from it) less under the proposed system than they do at present since they would participate directly, through the review board and civil damage suits, in a system which would deter wrongdoing more effectively than it is deterred now. At present, judges participate in a system in which misbehavior by law enforcement officials is rampant, apparently not decreasing significantly, and often tolerated or encouraged by superiors. Under the proposed system, the courts would become an integral part of a meaningful deterrent against official misbehavior. This is an improvement, and to the extent that the argument that government should derive no benefit from its wrongdoing is founded on the fear that such benefits would break down any deterrence mechanism (and therefore provide an incentive for wrongdoing), it should be remembered that a system without the rule, such as the one proposed here, would seem to provide a stronger deterrent than the present system of exclusion.

Under the proposed system, the government would obtain some convictions on the basis of improperly obtained evidence (though the stronger deterrent should substantially reduce official misbehavior). The courts would permit these convictions because of their commitment to conviction of the guilty and acquittal of the innocent, just as they would refer errant law enforcement officers to the disciplinary board because of their commitment to

fair play, due process, and the deterrence of illegal practices. Such a procedure would strike a better balance between the various objectives of the judiciary than the present, one-sided concern with procedural and evidentiary problems.

The Path Away from the Rule

The exclusionary rule seems to be so deficient and the alternatives sufficiently promising that we should cease clinging to the rule. Indeed, the rule does not in any substantial way do what the alternatives would--directly punish offending officers and provide compensation to innocent victims of illegal law enforcement activity--and it has at least one serious liability not attached to the alternatives: it releases otherwise convictable and possibly dangerous persons on society.

The practical problem is, of course, how do we move away from the rule as a monolithic remedy for police misconduct? As was pointed out earlier, if the exclusionary rule were simply abandoned without substitute, the police might infer that all constitutional restraints had been removed and that, in effect, open season had been declared on criminal suspects. Chief Justice Burger suggests that Congress should formulate substitutes, as it did in 1946 with the Federal Tort Claims Act, which provides a form of relief for those with claims against the federal government. If such substitutes were successful, the states might then wish to follow the federal model. I strongly endorse the Chief Justice's call on Congress to formulate substitutes for the rule and have suggested in my testimony what form these substitutes should take.

In discussing the path away from the rule, it is important to remember that the United States Supreme Court currently grounds the rule in the policy of deterrence, not in the Constitution itself. Therefore, there is no constitutional bar, according to the Supreme Court, to Congress formulating a substitute for the rule. Since the empirical evidence clearly undermines the deterrence argument for the rule, it is high time for Congress to put in place those substitutes for the rule about which Chief Justice Burger spoke ten years ago.

Abolition vs. Modification

The Attorney General's Task Force on Violent Crime has recommended that the rule be applied only in those cases in which a judge finds that a law officer acted in bad faith, that is, when he knew that his search or seizure was in violation of the law. In addition to the arguments against the exclusionary rule made previously in this testimony, there are a number of specific reasons for preferring abolition of the rule to the course recommended by the Attorney General's Task Force.

The task force recommendation provides little or no deterrence for violations deemed by the courts to be in good faith; this fact could encourage a careless attitude toward detail on the part of law enforcement officials, and might encourage police to see what can be gotten away with before the courts draw the line on what is an intentional violation.

The task force recommendation virtually guarantees years of trial and appellate litigation focusing on what constitutes good and bad faith violation. The Supreme Court has already made so many fine distinctions in dealing with the question of when police may search and seize that a number of police departments have had to employ attorneys to explain the rules to officers. The task force recommendation

would make Fourth Amendment law even more impenetrable to officers, upon whose understanding of the law the privacy of all of us depends. Courts, and especially the Supreme Court, should be given no encouragement to make more fine distinctions.

The task force recommendation puts a substantial premium on the ignorance of law enforcement officers. In order to render legitimate a search or seizure under the task force's proposal, the officer need only convince the judge that he did not know or fully understand the applicable legal requirements. Ignorance may not be bliss, but it surely will have its uses in future search and seizure litigation if the task force recommendation becomes law.

As long as the exclusionary rule exists, even in modified form, it is unlikely that we will try the kinds of alternatives to the rule that I and others have proposed: police discipline imposed by an independent review board to which cases of official misconduct would be reported by victims, the general public or judges; and a greatly improved civil remedy for innocent victims of illegal searches and seizures.

Such a civil remedy is being considered by a number of members of the Senate Judiciary Committee. These alternatives would deter official misconduct more effectively than does the rule, would involve none of the costs and disadvantages of the rule discussed earlier, and would belatedly bring some serious redress to innocent victims.

As long as the exclusionary rule exists, the rulings of judges in exclusion or suppression ^{hearings} may be improperly influenced in some cases by the conclusions reached by independent review boards as to the propriety of officers' actions, not to mention the improper influence on the judiciary which could be exerted by the findings of juries in relevant civil damage suits.

Conversely, the results of suppression or exclusion hearings will in some cases improperly influence the deliberations of jurors in civil damage cases or members of the independent review board. This problem of improper influence can be dealt with most effectively by abolishing the exclusionary rule.

Conclusion

The exclusionary rule is fundamentally unsound. The task force's recommended change in the rule would build an unsatisfactory halfway house between retention and abolition of the rule. Only a final end to the rule will produce the necessary incentive to try serious alternatives.

As long as this country, which has adopted a more extensive exclusion policy than that of any other nation, permits the rule to continue, it may well deserve the unhappy consequences of its failure to abolish the rule.

Senator HEFLIN. The hearings will be continued on November 12.
Thank you.

[Whereupon, at 12:15 p.m., the hearing was recessed, to reconvene on November 12.]

THE EXCLUSIONARY RULE BILLS

THURSDAY, NOVEMBER 12, 1981

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:50 a.m., in room 5110, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Also present: Senator Specter.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The committee will come to order.

This is the second day of hearings on several legislative proposals to limit or abolish the fourth amendment exclusionary rule in Federal prosecutions.

About a month ago, on October 5, we heard a variety of views on both the constitutionality of and the wisdom of such legislation.

We heard from a distinguished lawyer, one of my own brothers at the bar, Stephen Sachs, the attorney general of Maryland, and a former U.S. district attorney for the district of Maryland, who has in both capacities had firsthand experience with the effect of the exclusionary rule on criminal prosecutions. Based on his experience, Mr. Sachs advocated retention of the rule in its present form.

On the other end of the spectrum, Prof. Steven Schlesinger, a political scientist who has written on the exclusionary rule's empirical effect on the criminal justice system, argued that the studies of the evidence did not establish that the exclusionary rule has the deterrent effect on police misconduct for which it was devised, and called for it to be abolished.

Rejecting both the retention and abolition of the exclusionary rule, Assistant Attorney General Lowell Jensen announced the Reagan administration's support for a good-faith exception to the rule. The administration's proposal is similar to that suggested by the Attorney General's task force on violent crime.

Recently, Attorney General William French Smith told the National Press Club that establishing a good-faith exception to the rule was the administration's foremost proposal for restoring, and I am quoting the Attorney General now, "the proper balance between the powers of the law and the rights of the lawless."

As the debate continues today, the subcommittee will once again be examining a number of important questions, including whether the exclusionary rule is constitutionally mandated, or whether it is a judicially created doctrine subject to congressional alteration.

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Second, if the rule is susceptible to congressional alteration, in other words if it is not constitutionally mandated, then we must consider what alternatives, if any, would better serve the goals of the fourth amendment.

Finally, we must examine the original purposes for creating the rule and consider whether those purposes are as valid today as they were in 1914.

To help us grapple with these complex and controversial issues, we will have representatives of the American Bar Association, the American Civil Liberties Union, a crime victims association, and a citizens association.

Our first witness will be Prof. William Greenhalgh, professor of law at Georgetown University, who will be testifying as chairman of the ABA's Criminal Justice Section of the Legislation Committee. He will be followed by George Nicholson of the Citizens Association, Laws at Work, and Frank Carrington of the Crime Victims Legal Advocacy Institute.

Finally, the subcommittee will hear from Leon Friedman, professor of law at Hofstra University, appearing on behalf of the Civil Liberties Union.

We will welcome Professor Greenhalgh, and ask him to begin today's discussion.

STATEMENT OF PROF. WILLIAM W. GREENHALGH, CHAIRPERSON, CRIMINAL JUSTICE SECTION, LEGISLATIVE COMMITTEE, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY LOURIE ROBINSON, STAFF DIRECTOR, CRIMINAL JUSTICE SECTION

Mr. GREENHALGH. Senator, with your permission, I would ask Lourie Robinson, who is the staff director of the criminal justice section of the American Bar Association, to sit up here with me. She may be available to answer some questions concerning procedures of the ABA.

Senator MATHIAS. It is a great pleasure to have her with the committee this morning.

Mr. GREENHALGH. I think, Senator, it is too bad that this hearing could not have been held yesterday because 205 years ago in our State, article 23 of the Declaration of Rights was adopted by the general assembly. It might interest you to know that article 23 of 205 years yesterday tracks the present fourth amendment in substantial form. It was one of the seven prior to the Bill of Rights of the Thirteen Colonies.

Senator MATHIAS. I am interested in that. I make it a practice of keeping track of historic dates in the history of Maryland, but that was one that had escaped me.

Mr. GREENHALGH. As we know, it was not Armistice Day either, but Veterans Day. You being a historian, I thought that that bit of trivia might be of interest to you.

Senator, we are here today to strongly oppose all three recommendations to which you alluded in your opening statement. The first bill is S. 751, introduced by Senators Hatch and Thurmond. The second bill is S. 101 introduced by Senator DeConcini. We will have to assume that there will be a sponsor for the Department's

bill. We believe it will be similar to the one that was drafted for the Attorney General's Task Force on Violent Crime.

We would like to address ourselves to all three pieces of legislation as follows:

S. 751, Senator, is outright nullification of the fourth amendment exclusionary rule as we know it today. It provides that in all Federal criminal trial proceedings, if the evidence is secured in violation of the fourth amendment, it will not be a bar to its admissibility. True, there are Federal tort remedies as a substitute in that bill, but that is something else as a legislative matter.

We would oppose S. 751 for several reasons. The first reason is that we do not believe, and this is really difficult to say to a law-making body, that you possess the power to abolish the fourth amendment exclusionary rule. You would have had that power up until June of 1961, because at that time, between 1914 and the *Weeks* case, which announced the exclusionary rule, and *Mapp v. Ohio*, there is no question that the Supreme Court enunciated the rule within its supervisory power over the administration of all Federal courts.

Our position is quite simple. Since it became the law of the land through the due process clause, Congress should not try to abolish the rule as such.

We feel that to destroy the remedy is to destroy the right. In this case, we are talking, Senator, of the right to be secure in our houses, in our persons, in our papers and effects, against unreasonable searches and seizures. I think that it is very important that we understand that. In our statement, we have cited several cases which I think flatly reject the notion that the Congress can enact legislation which would be violative of the Constitution.

Senator MATHIAS. Why do you suppose the Court took so long to take that evolutionary step between 1914 and 1961?

Mr. GREENHALGH. That is a fascinating question because I am in the process of writing a book on precisely that issue. I will try to trace that.

Senator MATHIAS. I don't want you to give away the last line this morning, and affect the sales of the book.

Mr. GREENHALGH. It is a long way from production yet, Senator.

If you look closely, between 1914 and 1961 there are several eras of adjudication effectuated by the Supreme Court. I would say, generally, between 1914 and up until 1946 or 1947, the Court was struggling with the various clauses or words in the fourth amendment, for example, the two words "probable cause." As you know, the second part of the fourth amendment says, "No warrant shall issue but upon probable cause," and so forth. There were a series of cases that were interpreting what the law was in that particular area.

If it had not been, Senator, for the National Prohibition Act, or the Miller Act with regard to narcotics, there probably would not have been this formative period as far as the fourth amendment is concerned, because almost all of those cases involved either dope or booze as such. But during that period there was a cautious approach of adjudication based on Anglo-American jurisprudence, taking from England what they meant, for example, as a search in-

cident to a valid arrest. All these were decided in a chronological sequence over a period of time.

In the late 1940's, which I call the vintage years with regard to the fourth amendment, there was a series of cases that redefined as best as the court could the general principles concerning the law of probable cause and search and seizure. Of course, the classic case, the bellweather case, the seminal case that came down in 1949 was *Wolf v. Colorado*, which at that time decided by a majority of the Supreme Court that as a result of what had occurred in the United States between 1914 and 1949 that the fourth amendment belonged in the concept of ordered liberty, and therefore was part of the due process clause. However, they decided at that time not to impose the due process clause on the 50 States.

Then came the era of the 12 years between *Wolf* and *Mapp*. I trace that fairly carefully in our statement under the subheading, the Supreme Court's Cautious Course between 1949 and up until about 1956, where we did have several cases. For example, one of the most extreme examples was the *Rochin* case, which they did reverse because they did find in the facts of that case a violation of the due process clause.

Between 1956 and 1961, what I have described as a period of reintegration, which means to make more uniform, it is then the advent of what was going to transpire concerning the fourth amendment. If you will look at the series of cases in our statement, you will see that all of a sudden the Court decided, well, it would appear that sometime within the foreseeable future, that they will make this enforceable in all the States, and they had better make sure that they lay down understandable, fundamental criteria as to the law of probable cause and searches and seizures.

Those cases that are cited in our statement precisely, do that. For example, the three classic cases dealing with the law of Federal probable cause concerning the sufficiency of evidence for warrantless arrest, arrest warrants, and search warrants are all there.

I think the high water mark, just before *Mapp* was decided, was Justice Potter Stewart's monumental opinion in *Elkins v. United States* which overruled the Silver Platter doctrine, what we loosely call the metallurgical metaphore. At that time, as you will recall, the same day that *Wolf* was decided, *Lustig v. United States* was also decided, and they said, "We will still entertain illegally seized evidence by State officers, and allow it to be handed over on a silver platter to Federal prosecution officials."

Elkins was 1 year before *Mapp*, and it laid it all out. There was an appendix, for example, in the *Elkins* case which showed where the States had come, how many, as a result of *Wolf*, into line, such as the great State of California in the *People v. Cahan*, to impose their own exclusionary rule under their own interpretation of their State constitution.

In summary, Senator, I think it is important that this cautious course has extended over a very substantial period of time, 67 years of the history of this Republic dealing with a very, very controversial issue. I think it is very important that the subcommittee understand that what you are being asked to do here today is in rather summary fashion reverse a position upon which this country was founded.

I think this is the long answer to your question, but I think it was important that we do see chronologically as to what these cases were about, and how many have been decided.

It might interest you to know, Senator, that between 1914 and 1961, when *Mapp* was decided, there were 60-some cases interpreted by the Supreme Court, and just about half were decided in favor of the Government as well as the other half were decided in favor of the individual. You know this talk about the criminal was to go free because the constable has blundered, it has not all been that way, and we think it is an important consideration to remember.

Senator MATHIAS. As you have described these years and the unfolding events, I am a little bemused by what was happening outside the Supreme Court chambers. They were pretty tumultuous years, and if the Supreme Court follows election results, they also have to follow the fact that wars and global convulsions were going on, and it may have been constantly reminding the Justices that the dangers that the Founding Fathers had experienced in the revolutionary period had not evaporated from the human scene.

Mr. GREENHALGH. An illustration of that, Senator, is Justice Potter Stewart's very fine paragraph in *Coolidge v. New Hampshire*, which was decided in 1972, and you can understand where the country was in 1972 with Vietnam and other things. He substantially said, "This is the time we should be much more careful with what we do." That was one of the most controversial cases ever decided by the Court, a vicious murder of a young girl, which unfortunately the prosecution was not too swift on how they proceeded in that case.

Again, the Chief Justice of the United States recently, in *United States v. Chadwick*, said very much the same thing with regard to the Founding Fathers, and the reason why the fourth amendment was adopted by the Congress was an important consideration at that time.

We therefore think S. 751 should be opposed on constitutional grounds. We think the most important thing about 751 is its total nullification of the rule itself. Another constitutional argument, Senator, if this was to happen, this would abolish the objective standard of reasonableness which has been what the court's basis of all these decisions ever since 1914.

What we mean by that is alluded in our statement. A fairly good definition of that is in the first case decided after *Mapp v. Ohio*, in *Ker v. California* written by the same Justice, Justice Clark, where he defines what the standard of reasonableness is. It is constitutional in origin, and it is fundamental criteria.

All through this period of time, every law enforcement officer knows, as a result of what he does, if he is going to interpose his will against the citizen, that he must have the facts and circumstances objectively as to what his course of action is going to be. I will get to that a little bit further when we get to the good-faith exception which will reverse that significantly.

So, S. 751 in our judgment would also abolish the objective standard of reasonableness which has been the law in this country since 1914. We think that is an important consideration.

Going to S. 101, for the life of us we don't understand where this proposal came from, except that we believe that this is a holdover

from the Bentsen bill that was introduced sometime around 1971, the so-called substantial violation test, which would be a substitution to supplant the exclusionary rule as we know it today.

There is some difficulty with this also. It is less radical in its form of modification, but also we think it has some very serious flaws from a constitutional point of view. If you look at it carefully, it says that the evidence will not be suppressed in violation of the fourth amendment unless there is an intentional or substantial violation.

Then, the bill goes on to delineate four or five criteria by which any Federal judge could look at and see whether or not these criteria are met as to a substantial violation test. For example, the first criteria is the extent to which there was recklessness by the Federal law enforcement officer. The second one is the extent to which the individual's privacy was invaded. The third is our old friend "deterrence." The fourth one is, could it have been inevitably discovered but for this, or is there attenuation between the actual illegal act and the seizure of the evidence.

We think it is important here to realize that what you would have in an evidentiary hearing under rule 13(b)(3) in this type of situation that any of the many hundreds of Federal judges could look and say, "Well, I look at the facts of this case, and to my mind it is not reckless. There also was not that degree of invasion of privacy. I don't know, if I suppress this, that this will deter the Postal Service or the FBI any more than it was." He can always find inevitable discovery. He can always find that.

Senator MATHIAS. There are a lot of subjective decisions that would be made. This would be a long way, a far cry from Thomas Jefferson's admonition that we should bind men down with the chains of the Constitution, not the speculations, not the subjective musings about the Constitution, but with the chains of the Constitution. This would pretty effectively sever the links of the chain of the Constitution as far as the fourth amendment is concerned.

Mr. GREENHALGH. Absolutely, Senator. I hate to use the word "frightening," but I think it is important that because of the change with regard to what we are doing here, you would have to understand not only this but the good-faith exception would change the attitudes of Federal law enforcement concerning their particular role in this regard. We think that is a very, very important consideration as we talk about the experimentation towards the either abolition or modification of the exclusionary rule in the fourth amendment area.

S. 101, as I said, I do not know exactly the history of it, except for the Bentsen bill in 1971. I might say this, Senator, there is no support whatsoever in existing case law. The 184 cases have been decided by the Supreme Court, there has never been a substantial violation court test. We think that is important if we are going on precedent of what the Court has said.

Getting to the third, and perhaps the most venturesome modification of the fourth amendment is the Assistant Attorney General's recommendation to you on October 5, which Mr. Carrington, who is just behind me, and his task force recommended to the Attorney General, and that is asking the U.S. Congress to enact a good-faith exception. That is that evidence obtained during the

course of a reasonable good-faith search should not be excluded from Federal criminal trials.

Up front, Senator, on page 7, I have cited seven cases where a majority of the Supreme Court has consistently rejected the so-called good faith test. The three most important and of somewhat recent vintage, but we are talking of about 67 years, is the marvelous language in the *Carroll* case, which was really the first Supreme Court case to establish what the law of probable cause was all about. It dealt with an automobile seizure.

The *Henry* case, which incidentally, Senator, is where you can find the allusions by Mr. Justice Douglas concerning the Maryland Declaration of Rights. It is a very significant opinion dealing with the history of the fourth amendment.

Then last, but not least, the direct quote of Mr. Justice Stewart in *Beck v. Ohio*, which was one of the first cases after *Mapp* that the Supreme Court decided. I direct your attention to that quote on the bottom of page 7:

We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough," citing *Henry*. "If subjective good faith alone was the test, the protections of the fourth amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' in the discretion of the police."

As far as the American Bar Association is concerned, that is existing law until the Supreme Court, of course, says it is not. At least precedent would indicate to us that that case still is the case of the land.

On page 8, Senator, I allude to what I call a very, very practical problem, and that is, if you change, as you suggested in your remarks, the different test here on substantial violation, is the burdens that will be thrust on the sitting Federal judges in every evidentiary hearing under rule 12(b)(3), who have had the accumulation of years of wisdom of precedent and experience dealing with the objective standard of reasonableness, as opposed to a substantial violation test.

I quote from Mr. Justice White at some length in a very recent case, *Delaware v. Prouse*, which lays out the objective standard. You will note that it was a significant vote in favor of Brother Prouse in that, and also in *Dunaway* which was decided in the same term.

Justice Brennan wrote *Dunaway* and, again, in footnote 11 in the *Dunaway* case, alludes that objectively reasonable standards must be applied. That, we think, is very significant because the substantial violation test would eviscerate completely the objective standard of reasonableness.

The other thing that concerns us, which I put on the top of page 9, Senator, is the minimal burden of proof to be established by the Government, and that is at the lowest rung of the evidentiary ladder. We suggest to you a recent case decided by the Supreme Court where the definitions of "mere preponderance of the evidence," "clear and convincing proof," and "beyond a reasonable doubt" are defined with some degree of clarity.

It was a case dealing with the civil commitment of a mentally ill person under Texas procedures called *Addington v. Texas*. Even though I have forgotten my statement in my office, as I do recall it

as being in 441 U.S. 1978. If there is any thought of proceeding, we think it is well that the subcommittee consider the burdens of proof, and certainly this mere preponderance of the evidence would make it very easy for the Government on both the good faith and substantial violation tests along those lines.

We think the other thing in switching tests is that you are going to have endless litigation in your Federal courts to deal with this new test. This was alluded in the *Joanne Williams* case itself by the 10 concurring judges of the U.S. Court of Appeals for the Fifth Circuit, when they said that a host of interpretive problems would be engendered upon them as they took to task the other 13 judges who said that there should be a good faith exception at that time.

Senator MATHIAS. Going back to the substantial violation question, it occurs to me that it is almost a contradictory proposal, a self-contradictory proposal. A question of whether there is a substantial violation of the fourth amendment is very analogous to whether there had been a substantial violation of chastity.

I don't see how you can quantify or qualify those certain aspects of human life, and this is one of them. If there is a violation, there is a violation.

Mr. GREENHALGH. As you know, a lot of these violations are by 5-to-4 votes, and there are vigorous dissents because one Justice may read it a different way. But you are absolutely right. It is for them to decide, in our judgment, and not for Congress.

I dug up the only Law Review article I thought was somewhat relevant, and it is the one in the middle of page 9. I thought the last paragraph of Brother Hoopes' article in the *Arizona Law Review* was quite important, because what you are doing with good faith, you are substituting the civil test—you are substituting no longer objectivity, but subjectivity concerning what the remedies are in a civil law suit.

The last sentence says:

This result seems inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer.

It is exactly what Justice Potter Stewart said in *Beck v. Ohio*.

Senator, you raised on October 5 an interesting observation with Mr. Jensen, as I recall, concerning, is this the beginning of whether or not the Congress should consider good faith exceptions to first amendment legislation.

I thought about that, and I am taking two steps further, which again somewhat disturb me. Could this also be the beginning to substitute or eliminate the fifth amendment privilege against self-incrimination concerning the totality of the circumstances in a confessional sense.

In other words, "while in good faith I was trying to get the answer for him," and we are talking about no physical coercion, we are just talking about general persuasion and things like that. Second, could there be an extension that the prohibition against the use of statements taken from an accused in the absence of counsel, which would be in violation of the sixth amendment, would that also be something that could be used as a wedge to begin to open those particular doors?

You will see a marvelous quote at the top of page 10, Senator, written by Mr. Justice Bradley in the first real decision deciding the fourth amendment within a criminal context in what we call the granddaddy of them all, *Boyd v. United States*. It is the Latin *Obsta Principiis*. If you look that up in Black's law dictionary, it says "withstand the beginnings." In other words, face this issue and withstand the beginnings of this erosion of the Bill of Rights.

The rest of the statement goes on. I have already traced the cautious course of the Supreme Court.

We would like to reiterate here, Senator, that we think an important thing was lost somewhat in these arguments, and the rhetoric surrounding the exclusionary rule. The court, time and time and time again has said that the rule extends to protect the innocent as well as the guilty. Everybody says, if you are innocent, you don't have to worry about being guilty.

I would like for a few minutes to trace the history of myself walking out of the Supreme Court of the United States, if today, for example, it should abolish the exclusionary rule, and walk down Constitution Avenue or in its environs, and tell you what could occur.

We will have to expect that I am an innocent person, but without the fourth amendment exclusionary rule, the following Federal law enforcement or city officers could annoy, humiliate, and harass me, and ask me to spread, ask me to be searched, and so forth and so on, to this extent.

You can walk out of the Supreme Court and get that treatment by the Supreme Court Police. You can cross the street and get that treatment by the Capitol Police. You can walk down Constitution Avenue, and the same by the Park Police. You go by the FBI Building, the Post Office Building. You go by the White House and the Secret Service. The Federal Reserve Board, the same way. If you go on up to Embassy Road, the Executive Protective Service. Then suppose you decide, "I have had enough of this. I am going to go visit some of my friends at the National Zoo," the same thing. By that time, guess where you are, at St. Elizabeth's, and precisely the same thing can happen there.

The purpose of the fourth amendment as we know it, and why the Founding Fathers put that in in 1789, and then ratified in 1791, was precisely so the ordinary citizen, the law-abiding citizen cannot be hassled, cannot be annoyed, and cannot be humiliated. I think they lose sight of that. It is also there for the protection of the innocent as well as the guilty. We have cited many, many cases on that.

Senator MATHIAS: I think this is a point that needs to be emphasized again and again, that this was to prevent the intrusion of government into the lives of ordinary law-abiding citizens who are minding their own business, and who suddenly, because of some extraneous circumstance over which they had no control, were brought within a wide net that was being thrown out.

Of course, it is obviously easier for law enforcement officials in any time, in any political system, like a fisherman, just to throw out a big seine and scoop up everything you can. Then, you can at leisure sort it out, without regard to the difficulties that this kind

of a net creates for the innocent people that get caught up in it. This is precisely what we are trying to avoid in this country.

Mr. GREENHALGH. Senator, at the bottom of page 17, in another argument, we have put down, I think, the most egregiously abusive circumstances that the Supreme Court has decided in favor of the individual. You will see what you and I have just alluded to.

This would prevent arrests at will of anyone with only a previous criminal record. You suggest the gathering up of everybody, the dragnet arrests that occurred in *Davis v. Mississippi*. Arrest for investigation, pick and bring in, and so forth and so on. These are precisely the reason it was in there.

The British went to court, got these writs of assistance, force their fellow citizens to assist them in going through and rummaging around in roving commissions in houses, warehouses, boats, everything, looking for goods taxes upon which had not been paid. The whole concept is exactly that, that the ordinary citizens should be able to walk down the street in a public place, or in a sanctuary, and be left alone as Justice Brandeis said in the *Olmstead* case, assuming that he is law abiding.

We think it is a very, very important consideration in all the cases that we cited concerning the protection of the innocent. There are many, many more, but those are the most classic with regard to the use of the English language, and the strength by which those words were uttered by the Supreme Court of the United States.

Getting a little bit further along, I list some 80 cases at pages 14, 15, and 16 where it has protected the individual. Interestingly enough, Senator, 16 times the Supreme Court has protected the rights of the businessman, whether it be a lawyer, whether it be a corporation, whether it be a partnership, whether it be a labor union organizer, and all that. So it would appear that the business interests in America, also, are protected by the fourth amendment.

We think the last part of our statement may be even more significant, and that is, let's set aside the arguments for and against the constitutionality and the public policy. Now the real issue is it necessary based on existing law and Federal law enforcement factors in America today?

We have cited the Comptroller General's report that was authorized by your full committee under Senator Kennedy a couple of years ago, and its impact on the exclusionary rule in Federal criminal prosecutions. We have cited as a guide. There is some controversy concerning some of the statistics in there. All I can say, if there is controversy, it would appear that GAO has a matrix, and you could send this back for further study and a closer look at it.

However, in our judgment, reading what we can, it would appear that the exclusionary rule has little effect on prosecutions in Federal courts, only four-tenths of 1 percent of the cases were turned down under the fourth amendment. The controversy is at what time were some of these screened as opposed to the time between presentment and presenting to a grand jury.

Also, the INSLAW researchers, the two prestigious reports that they put out show a low rate of rejections due to improper police conduct. GAO is your own agency, and INSLAW has an excellent

reputation, they should be taken into consideration as to whether or not this legislation is necessary.

In summation, Senator, we strongly believe that efforts either to abolish or to modify are unconstitutional, unwarranted, and unnecessary. We would hope that the subcommittee would take all this into consideration and take this piece of legislation and see that it does not see the light of day.

Senator MATHIAS. The Department of Justice has told us that over time, as the rule has been explicated, it has become clear that the rationale for the rule is deterrence, and the asserted rationale of judicial integrity has been essentially abandoned.

I think you have already dealt with that to some extent this morning, but Justice Brennan in *Calandra* noted that:

Uppermost in the minds of the framers of the exclusionary rule was not the rule's possible deterrent effect, but the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness, and assuring the people that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.

What thoughts do you have about the question of judicial integrity?

Mr. GREENHALGH. That was the high water mark in *Elkins v. United States* by Mr. Justice Potter Stewart, which then was taken by Mr. Justice Clark when he wrote *Mapp*. It was the other prong to support the rationale behind the exclusionary rule deterrence—that is, the imperative of judicial integrity.

Unfortunately, a majority of the Court in *Calandra* disposed of the second prong, and that is what Mr. Justice Brennan is bringing to our attention.

Frankly, Senator, it really doesn't make any difference because it is the Supreme Court that is interpreting the fourth amendment and its own exclusionary rule as they see it. In our statement you will see many, many cases where they have limited the expansion or the activities of the exclusionary rule, *Calandra* was one of the first.

There are several cases there. As you well know, they have now limited Federal habeas corpus relief in *Stone v. Powell*. They have limited Federal grand jury proceedings in *Calandra*. They have limited Federal civil proceedings in the *Janis* case. That whole list is there. But it doesn't make that much difference because still the thrust is the protection of the rights of the American public to deter lawless police activity, and that concept is still sufficient for the retention of the exclusionary rule.

The Court can experiment. It has the right to do so because it is interpreting the Constitution of the United States. I agree with Justice Brennan, but a majority of the Court said exactly that. If you look at it in context, in *Calandra*, what they were really talking about was only that you can present illegally seized evidence to a Federal grand jury, but you would still be able to move to suppress post indictment.

Senator MATHIAS. One of the arguments that is made in favor of the good faith exception is that it is consistent with the only remaining rationale for the rule, which is deterrence. In effect, it says that since you cannot deter unintentional violations of the fourth amendment, they are going to happen willy-nilly, therefore,

Congress has the power to engraft a good faith exception on the exclusionary rule. Do you think that that holds water?

Mr. GREENHALGH. We disagree because they will then abolish the objective standard of reasonableness which has been the law in this country for 67 years. They are entitled to their opinion, but they are wrong. Show us the case law, which the exception of these lower, intermediate appellate courts? It is not there. It has been consistently rejected for over 100 years.

Senator MATHIAS. Just as you say, "Show us the case law." Those on the other side say, "Show us where in the fourth amendment the exclusionary rule is specifically mandated," with, of course, the implication that it is just the result of judicial speculation. Of course, it might be possible to say the same thing of the Court's interpretation of the sixth amendment, to require the appointment of counsel.

Would you put congressional abolition of the exclusionary rule in the same category as congressional repeal of the decision in *Gideon v. Wainwright*?

Mr. GREENHALGH. That is absolutely, totally beyond the pale as far as to repeal *Gideon v. Wainwright* is concerned because you are dealing with the most fundamental concept, and that is the appointment of counsel at a critical stage of a criminal proceeding.

I think that maybe what they could be reaching for is the *Mas-siah*, *McLeod*, *Williams*, *Henry* rule dealing with the taking of statements. Again, the good faith exception may be an inroad on that.

The Founding Fathers, Senator, did not put into the Constitution a fourth amendment exclusionary rule, nor did they put into the fifth amendment an exclusionary rule concerning the privilege against self-incrimination, nor did they put a similar rule in the assistance of counsel clause. But if you are going to have rights to be protected, there must be judicially created remedies to enforce those rights. If you do away with the fourth amendment, soon to follow will be inroads with regard to the fifth and the sixth.

Senator MATHIAS. The late Senator from New York, Mr. Wagner, spoke in 1938 at the New York Constitutional Convention, and he said:

All the arguments that the exclusionary rule will handicap law enforcement seem to me to be properly directed not against the exclusionary rule, but against a substantive guarantee itself. It is the law, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

This, I think, reflects what Professor Kamisar has argued, that the criticisms of the rule are misdirected. He said that the criticisms are directed at the fourth amendment, and not at the rule.

Do you think it would be useful to spend a little more time looking at the fourth amendment, and not quite as much at the rule?

Mr. GREENHALGH. If you did that, I think you would have to proceed by article V of the Constitution, which is the mandatory procedure. We think the reasons for which the fourth amendment was adopted by the U.S. Congress in 1789 are still valid today, and that is to preserve the right of the American citizen to be secure in all

those rights, and especially dealing with the interpretations that have been lodged on the warrant clause itself.

The history of this country, Senator, the seven colonies by which it came up, every one of those including our State—incidentally, Senator Specter's State has the best rendition concerning the progenitor of the fourth amendment—all dealt with prohibitions against general warrants. They felt very strongly about that because the British were going into everybody's house willy-nilly, and breaking down doors, and looking for untaxed goods.

We think the fourth amendment is solid with regard to its rationale, with regard to the purposes for which it was adopted, and if there is any fault with it, I think the only way that you can have a debate about that would be through the mandatory process on article V.

I do not subscribe to Mr. Wagner's comments.

Senator MATHIAS. You have referred to the General Accounting Office report on impact of the exclusionary rule on Federal criminal prosecutions. The Department has also commented on that report, and the Department has said that:

This report made no attempt to even identify the cases dropped by law enforcement agencies before presentation to the Justice Department. Also, although an attempt was made to obtain data on the impact of the Fourth Amendment on cases accepted by the United States Attorney's Offices, the offices participating in the study were asked to record data only for cases formally entered into the system. It is our experience that many cases are discussed informally with the United States Attorney's Offices and law enforcement personnel, and declined for prosecution without a written notation of entry into the system. Thus, we take issue with the implicit conclusion of the GAO report that restricting or eliminating the Fourth Amendment exclusionary rule would have only a minor impact.

Mr. GREENHALGH. There could be many different reasons for declination of prosecution. I can think of a host of different reasons, for example, the weight of the evidence. We are not even talking about potential constitutional violations of the fourth, fifth, or sixth. We are talking about the individual, the complexity of the case, the victims themselves, the people involved, the participation, and all that.

Again, as I suggested earlier, if they feel that strongly about it, it seems to me, since you have a matrix in the making with regard to this GAO report, that this whole process could be reevaluated again, and you could get more recent data.

I direct your attention, Senator, on page 13, "However, case screening by the U.S. attorneys might have caused the figures in the above discussion to be understated." How do we define "case screening"? Are we talking about informal conversations, as you suggest, between U.S. attorneys and Federal law enforcement officers; or are these the ones where there are warrantless arrests that up for presentment, and they are evaluated at that time as to whether or not they go forward to a preliminary hearing? Are these postpreliminary hearings, with the grand jury washing them out before that? I don't know.

Anyway, it seems to me that they certainly could tell from motions filed as to the percentage of cases lost, and I think that would be a solid statistic.

Senator MATHIAS. We thank you very much for your testimony here today, and for your continuing interest in this subject. If I ne-

glected to say so at the outset, your full statement will, of course, be included in the record.

Mr. GREENHALGH. We very much enjoyed being here today.

Senator MATHIAS. Thank you, very much.

[Summary of testimony and prepared statement of Professor Greenhalgh follow:]

**SUMMARY: STATEMENT OF PROFESSOR WILLIAM W. GREENHALGH ON BEHALF
OF THE AMERICAN BAR ASSOCIATION CONCERNING FOURTH AMENDMENT
EXCLUSIONARY RULE LEGISLATION - November 12, 1981**

- The American Bar Association supports retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We urge the Subcommittee to reject pending legislation to modify or eliminate the rule.
- Pending legislation takes several approaches: S. 751 is intended to abolish the rule altogether in federal criminal proceedings. We do not believe Congress has the constitutional authority to do this. A careful reading of the pronouncements of the United States Supreme Court reveals that the rule is an essential part of the Fourth and Fourteenth Amendments. This constitutionally proscribes the Congress from revoking or rescinding the rule.
- S. 101 is calculated to retain the rule only in cases where there has been an "intentional or substantial" violation of the Fourth Amendment. We oppose this formulation, for we believe it purports to permit what the Fourth Amendment prohibits, thus plainly violating constitutionally mandated guarantees. It also abolishes the standard of reasonableness established by the Supreme Court.
- A third proposal would provide a "good faith" exception to the rule. The U.S. Supreme Court has consistently rejected this test. Further, it would abandon the objective standard by which courts for 67 years have scrutinized the admissibility of evidence, putting in its place a subjective "good faith" test. Federal law enforcement officers would undoubtedly be permitted to testify not only as to their state of mind regarding "good faith," but probably to give opinion testimony as well. Further, a new "good faith" test would engender years of litigation before it is clearly defined, exacerbating the problems already facing busy trial courts.
- Public policy also militates against any lesser standard for admission of evidence in criminal proceedings. Existence of the rule has contributed greatly to law enforcement professionalism at the local, state and federal levels. Federal law enforcement is living and working now within the framework of the rule.
- Abandoning the rule will not result in ensnaring many criminals now going free. Empirical evidence refutes the argument that the rule results in hordes of criminals being turned back on the streets. For example, a General Accounting Office study found that in only 1.3% of 2,804 federal felony cases studied was evidence excluded as a result of the rule. An Institute for Law and Social Research study found that due process reasons, such as unlawful searches and seizures, were responsible for only a tiny portion of the rejections of cases at screening in four local jurisdictions studied--less than 2%.
- While the ABA joins with the Administration and Congress in seeking effective means of fighting crime, we oppose efforts to modify or abolish the exclusionary rule. In our view, such efforts are unconstitutional, unwarranted and unnecessary--and would, in any event, result in few additional criminals ending up behind bars.

PREPARED STATEMENT OF PROF. WILLIAM W. GREENHALGH

Mr. Chairman and Members of the Subcommittee:

The American Bar Association is pleased to appear before you to express our views on the subject of the Fourth Amendment exclusionary rule. As Chairperson of the ABA Criminal Justice Section's Legislation Committee and as Section Chairperson-Elect, I have been Designated by ABA President David R. Brink to represent the Association.

My own background in the criminal justice area has included both prosecution and defense experience. I am presently a clinical professor of law at Georgetown University Law Center and have been Director of the E. Barrett Prettyman Program (L.L.M. in Trial Advocacy) since 1963. That program has represented over 2,000 indigents charged with felony offenses in the various courts of the District of Columbia. It has produced, among others, a book entitled, "Law and Tactics in Exclusionary Hearings" (Coiner Publications, 1969).

Before going to Georgetown, I worked as a staff attorney with the Justice Department's Internal Security Division, and served in the U.S. Attorney's Office in Washington, ending my tenure as Chief Assistant U.S. Attorney for the District of Columbia, General Sessions Division. I am presently writing a treatise on "The History and Development of the IVth Amendment Exclusionary Rule."

Just as the American Bar Association is, of course, reflective of the legal profession as a whole, so, I should note, is the Section of Criminal Justice representative of all segments of the criminal justice system. The Section is neither the voice of the defense bar nor the prosecution. Our members include prosecutors, criminal defense lawyers, public defenders, judges, law professors and law enforcement officials. We try to reflect that balanced view in policy positions which we adopt.

ABA POSITION SUPPORTS EXCLUSIONARY RULE

The American Bar Association has long supported retention of the Fourth Amendment exclusionary rule in state and federal criminal proceedings. We continue to do so, and urge this Subcommittee to approach this issue cautiously -- and reject proposals to modify or eliminate the rule in criminal trial proceedings. Despite the rhetoric prevalent today, its abolition will not stem the tide of crime in our country -- but tampering with it will destroy a portion of the cherished constitutional fabric of which our system is constructed.

The scholarly debate on the subject of the exclusionary rule has been extended and inconclusive. See, Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 U. Chi. L. Rev. 665 (1970); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Stud. 243 (1973); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974); Comment, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 NW. U.L. Rev. 740 (1974). United States v. Ross, No. 79-1624, Wilkey, J., dissenting op. at 48-63 (D.C. Cir. March 31, 1981). Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337 (1978); Wilkey, A Call for Alternatives to the Exclusionary Rule: Let the Congress and the Trial Courts Speak, 62 Judicature 351 (1978).

For that reason, we believe it is most fruitful to focus on two aspects of this issue: What does the Constitution require, as reflected in the development of case law in this area? And what does the empirical evidence suggest as to the impact the exclusionary rule has had in case disposition? As to the first, we believe that pending legislation to modify or abolish the rule in federal criminal proceedings is unconstitutional, based on an analysis of relevant cases. As to the second, available statistics reveal that the rule has had little impact on case dispositions in the nation's courts. The data do not support the contention by many that hordes of criminals go free because of such "technicalities." Further, violent offenses account for only a tiny percentage of federal and state cases dropped because of the exclusionary rule.

From the Association's extensive criminal justice work, we recognize that there are no easy answers to crime — something of which each member of your Subcommittee is well aware. In the midst of the current emotional climate, we must avoid adoption of apparently simple solutions to crime which not only pose constitutional problems, but also offer false promise. We do not believe that elimination or modification of the exclusionary rule is an effective tool for solving the crime problem in America.

Let us turn now to the first prong of our analysis — an examination of

what the Constitution requires, as interpreted by the United States Supreme Court.

AN EXAMINATION OF CASE LAW SHOWS THAT THE RULE IS CONSTITUTIONALLY MANDATED

We believe it useful to couch our discussion in terms of several bills now pending in the Senate to abolish or modify the exclusionary rule. These are S. 751, introduced by Senators Hatch and Thurmond, which would nullify the Fourth Amendment exclusionary rule completely in federal criminal proceedings; and S. 101, sponsored by Senator DeConcini, which would substantially modify the Fourth Amendment by allowing admission of evidence obtained in violation of the Fourth Amendment unless the violation was intentional or substantial. We understand the Administration will also be proposing legislation to provide a "good faith" exception to the exclusionary rule. This has not yet been sent up to the Hill and introduced.

Since February of 1973, the American Bar Association has been firmly and publicly opposed to legislative efforts to limit the exclusionary rule. That policy was taken in reaction to S. 2657 (92nd Congress), introduced by Senator Bentsen in 1971. S. 2657 combined features now found in both S. 751 and S. 101. Their aims are substantially similar.

OUTRIGHT NULLIFICATION

Bluntly put, 18 U.S.C. §3505 as proposed in S. 751 is intended to nullify the federal Fourth Amendment exclusionary rule of evidence. We do not believe Congress has the constitutional authority to abolish the exclusionary rule. What was once a mere federal rule of evidence in 1914 became a cloth scotchguarded with the impregnability of constitutional enforcement in 1961.

As Mr. Justice Day historically declared in Weeks v. United States, 232 U.S. 383 (1914) at 391 and 392:

In the Boyd case, *supra*, after citing Lord Camden's judgment in Entick v. Carrington, 19 Howell's State Trial, 1029, Mr. Justice Bradley said (630):

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rumaging of his drawers, that constitutes the essence of the offense; but it is

the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. (emphasis added)

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

S. 751, which is destructive of Fourth Amendment rights, similarly should find no sanction in Congressional enactment.

When the Supreme Court of the United States held in Mapp v. Ohio, 367 U.S. 643 (1961), that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments, it constitutionally proscribed the Congress from revoking or rescinding the exclusionary rule in the administration of the American criminal justice system.

It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. Almeida-Sanchez v. United States, 413 U.S. 266, 372 (1973). Only the Supreme Court has the authority to remove or reduce the application of the exclusionary rule. United States v. Calandra, 414 U.S. 338 (1974) (federal grand jury proceedings); United States v. Janis, 428 U.S. 433 (1976) (federal civil proceedings); Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus relief); United States v. Ceccolini, 435 U.S. 268 (1978) (attenuation);

United States v. Crews, 445 U.S. 463 (1980) (in-court identification); United States v. Havens, 446 U.S. 620 (1980) (impeachment); United States v. Salvucci, 448 U.S. 83 (1980) (standing). Proposed §3505 in S. 751 is, therefore, patently unconstitutional in our view.

SUBSTANTIAL VIOLATION SUBSTITUTE

A less radical proposal presently pending before the Senate is S. 101. It is calculated to retain the federal exclusionary rule only in cases where there is an "intentional or substantial" violation of the Fourth Amendment. The criteria enumerated in the bill as to a determination of substantiality — recklessness, privacy invasion, deterrence, inevitable discovery, or attenuation — would, in fact, provide a federal court with a basis for allowing admission of virtually all illegally seized evidence.

By even attempting to limit the application of the federal exclusionary rule — which is now a matter of due process — S. 101 purports to permit what the Fourth Amendment prohibits. It is thus facially violative. Torres v. Puerto Rico, 442 U.S. 465 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Berger v. New York, 388 U.S. 41 (1967); cf. Camara v. Municipal Court, 387 U.S. 523 (1967); Sibron v. New York, 392 U.S. 40 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Brown v. Texas, 443 U.S. 47 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). It plainly violates constitutionally mandated guarantees.

S. 101 is facially void for another reason. It abolishes the standard of reasonableness. As Mr. Justice Clark declared in Ker v. California, 374 U.S. 23 at 33-34 (1963):

We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, e.g., Spano v. New York, 360 U.S. 315, 316 (1959); Thomas v. Arizona, 356 U.S. 390, 393 (1958); Pierre v. Louisiana, 306 U.S. 354, 358 (1939). While this

Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the records so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. (emphasis added)

Thus, S. 101 contemplates the substitution of a "substantial violation" test, which has never been followed by a majority of the Supreme Court.

GOOD FAITH EXCEPTION

A third, and perhaps more venturesome, proposal to limit the application of the exclusionary rule may be found in the Department of Justice recommendation to the Congress that evidence obtained in the course of a reasonable, good faith search should not be excluded from federal criminal trials. (Statement of D. Lowell Jensen, Assistant Attorney General, Criminal Division, U.S. Department of Justice, before Criminal Law Subcommittee of the Senate Judiciary Committee on the Fourth Amendment Exclusionary Rule on October 5, 1981.)

The American Bar Association strenuously opposes this recommendation. Our reasons are several. First, for over 100 years a majority of the Supreme Court of the United States has consistently rejected the so-called "good faith" test. Stacey v. Emery, 97 U.S. 642 (1878); Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28 (1923); Carroll v. United States, 267 U.S. 132, 162 (1925); Henry v. United States, 361 U.S. 98, 102 (1959). Objectivity, not subjectivity, is the rule of law.

Perhaps it was best said by Mr. Justice Stewart in Beck v. Ohio, 379 U.S. 89 (1964) at 97:

We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." Henry v. United States, 361 U.S. 98, 102...if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. [emphasis added].

To say that the proposed "good faith" exception is "a workable rule governing arrests, searches and seizures" is to stand the Fourth Amendment on its head.

Second, in 67 years, federal trial judges have been interpreting a standard of reasonableness predicated on the accumulated wisdom of precedent and experience in every evidentiary hearing in which they have presided pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure (or its equivalent prior to 1946). At all times, an objective standard has been the test by which they have scrutinized the admissibility of evidence.

In Delaware v. Prouse, 440 U.S. 648 (1979) at 653-654, Mr. Justice White put it rather simply:

The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law-enforcement agents, in order "to safeguard the privacy and security of individuals against arbitrary invasions." (citations omitted) Thus, the permissibility of a particular law-enforcement practice is judged by balancing its intrusions on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause, or a less stringent test. (footnotes omitted)

In the same term, the Court reiterated its stress on objectively reasonable standards in Dunaway v. New York, 442 U.S. 200, 209 N. 11 (1979). Prouse was decided by 8-1 and Dunaway by 6-2 (with Justice Powell not sitting).

Assuming arguendo that Congress should enact the subjective "good faith" test to supplant the objective standard of reasonableness and the Supreme Court determines it to be constitutional, the effect in Rule 12(b)(3) evidentiary hearings in the 94 United States District Courts would be devastating. Federal law enforcement officers would undoubtedly be permitted to testify not only as to their state of mind regarding "good faith," but probably to give opinion testimony as well. With the burden of proof on the prosecution at the lowest rung of the evidentiary ladder — mere preponderance of the evidence to establish the search or seizure was undertaken in a reasonable good faith belief that it was in conformity with the Fourth Amendment — the Sixth Amendment adversary factfinding process in Federal courts would become a farce and mockery of justice.

Further, we contend that interpretation by the courts of a new "good faith" exception will engender years of litigation, exacerbating the problems already facing busy federal trial courts.

To illustrate our position more fully, the rather cogent concluding paragraph in Hoopes, "The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the §1983 Good Faith Defense: Problems and Prospects," 20 Ariz. L. Rev. 915, (1979) states at 951:

If the more salient problems of burdens of proof and workable standards for the determination of when the officer's intent may be judged culpable can be resolved, a properly defined and focused good faith test for exclusion could well provide a rational and effective means of protecting those rights provided for in the fourth amendment. Nevertheless, although the good faith test would appear to make no substantive changes in exclusionary rule analysis, if the Supreme Court draws heavily on the civil history of the good faith standard, the result may be an analysis that focuses disproportionately on the officer's assessment of the facts. This result seems inconsistent with the overriding policy of the fourth amendment that the determination of the propriety of a search and seizure is ideally removed from the discretion of the officer. (emphasis added)

Only retention of the objective standard of reasonableness can secure Fourth Amendment rights.

Third, we offer a further observation. If the Congress should enact the "good faith" test in the Fourth Amendment context, would not, as Senator Mathias asked in his hearing on October 5, 1981, there be a movement to consider a good faith exception to passage of legislation affecting First Amendment rights? Taking it two additional steps further, would this lead to proposals to eliminate the Fifth Amendment privilege against self-incrimination by supplanting the totality of circumstances test of confessional voluntariness — or the Sixth Amendment prohibition against the use of statements taken from an accused in the absence of counsel? As Mr. Justice Bradley warned almost 100 years ago, in Boyd v. United States, 116 U.S. 616 (1886) at 635:

Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.

So should Congress be as vigilant in the protection of the rights of the individual.

SUPREME COURT'S CAUTIOUS COURSE

Before Congress rushes into this constitutional thicket, one should reflect that the Supreme Court did not act hastily in imposing the federal exclusionary rule of evidence as a constitutional requirement binding on the states. During the 47 years between Weeks and Mapp, the Court construed some 60 Fourth Amendment cases, ruling for the government in over half of them. It is significant that the Court, after announcing its decision in Wolf v. Colorado, 338 U.S. 25 (1949), as to future enforceability of the federal constitutional rule on the states, waited another 12 years for decisional imposition. During this period, the Court permitted the states to experiment as "laboratories" with alternative remedies to the exclusionary rule.

Five years after Wolf, in a vigorously contested 5-4 decision, the Court in Irvine v. California, 347 U.S. 128 (1954), was again presented with the opportunity to impose Weeks on the states. Even though the facts were egregious — breaking and entering a home, secreting an eavesdropping device, and listening to conversations of the occupants for over a month — the Court declined to overrule Wolf. As Mr. Justice Jackson said at 134:

Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the Wolf doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to Wolf as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions.

The majority was patient, the minority perturbed.

More significant, perhaps, was the statement of the ultimate author of Mapp, Justice Clark, in his concurring opinion in Irvine at 138-139:

Had I been here in 1949 when Wolf was decided, I would have applied the doctrine of Weeks v. United States, 232 U.S. 383 (1914), to the states. But the Court refused to do so then, and it still refuses today. Thus Wolf remains the law and, as such, is entitled to the respect of this court's membership.

Of course, we could sterilize the rule announced in Wolf by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. Rochin bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as Rochin, would serve a useful purpose.

In light of the "incredible" activity of the police here, it is with great reluctance that I follow Wolf. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus I merely concur in the judgment of affirmance. (emphasis added)

Justices Black at 139-142, Frankfurter joined by Burton at 142-149, and Douglas at 149-152 were far less respectful of the Court's membership.

In any event, during the last five years before the Court decided in Mapp that the Fourth was enforceable through the Fourteenth Amendment, they were busily rehearsing for reintegration. They were formulating fundamental criteria in the federal arena. Giordenello v. United States, 357 U.S. 480 (1958) (sufficiency of probable cause for federal arrest warrants); Draper v. United States, 358 U.S. 307 (1959) (sufficiency of probable cause for federal warrantless arrests); Henry v. United States, 361 U.S. 98 (1959) (federal point of arrest); and Jones v. United States, 362 U.S. 257 (1960) (sufficiency of probable cause for federal search warrants). Uniformity awaited inevitability.

At the same time, the Court was tightening the noose of federal exclusion by drastically limiting the use of illegally seized federal evidence in state criminal

proceedings. Rea v. United States, 350 U.S. 214 (1956) (federal injunction against transferring to state authorities illegally seized federal evidence); Benanti v. United States, 355 U.S. 96 (1957) (state wiretap evidence violative of federal wiretap statute inadmissible in federal court).

Finally, the silver platter doctrine — allowing federal courts to admit evidence illegally seized by state officers — came under scrutiny once again. The flame that had kindled the fire that forged the doctrine was extinguished in Elkins v. United States, 364 U.S. 206 (1960), overruling Lustig v. United States, 338 U.S. 74 (1949), which was decided on the same day as Wolf. It was now but a question of time before Justice Clark would constitute the majority in overruling Wolf. He emphatically did so in less than a year when, in Mapp, he made the federal exclusionary rule binding upon the states. The last paragraph of his constitutionally mandated decision perhaps says it best:

The ignoble shortcut to conviction left open to the state tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the states, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. (emphasis added)

Thus, Weeks, through the Due Process Clause, became the law of the land.

THE EXCLUSIONARY RULE EXTENDS TO THE INNOCENT AND GUILTY ALIKE

It is important to recognize that the right to be secure guaranteed by the Fourth Amendment is not a right provided only to those who break the law. It is a right constitutionally guaranteed to all the people. It protects everyone — those suspected or known to be offenders — as well as the innocent. Weeks v. United States, 232 U.S. 383, 392 (1914); Gould v. United States, 255 U.S. 298, 307 (1921); Agnello v. United States, 209 U.S. 20, 32 (1925); Go-Bart Co. v.

United States, 282 U.S. 344, 357 (1931); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); United States v. DiRe, 332 U.S. 581, 595 (1948); Johnson v. United States, 333 U.S. 10, 14 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Brinegar v. United States, 338 U.S. 160, 176 (1949). It is the innocent victim of an illegal search and seizure upon whom we should focus constitutional protection. But we do this by retaining the exclusionary rule.

The exclusionary rule safeguards us in many ways: It protects our "persons," while walking, talking or traveling. United States v. DiRe, 332 U.S. 581 (1948); Rochin v. California, 342 U.S. 165 (1952); Giordenello v. United States, 357 U.S. 480 (1958); Henry v. United States, 361 U.S. 98 (1959); Wong Sun v. United States, 371 U.S. 471 (1963); Beck v. Ohio, 379 U.S. 89 (1964); Katz v. United States, 389 U.S. 347 (1967); Simmons/Garrett v. United States, 390 U.S. 377 (1968); Sibron v. New York, 392 U.S. 40 (1968); Davis v. Mississippi, 394 U.S. 721 (1969); Whitely v. Warden, 401 U.S. 560 (1971); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Brown v. Illinois, 422 U.S. 590 (1975); United States v. Brignoni-Ponce, 422 U.S. 872 (1975); Delaware v. Prouse, 440 U.S. 648 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Texas, 443 U.S. 47 (1979); Reid v. Georgia, 448 U.S. 438 (1980).

It secures our sanctuaries, whether they be "houses," Weeks v. United States, 232 U.S. 383 (1914); Agnello v. United States, 269 U.S. 20 (1925); Byars v. United States, 273 U.S. 28 (1927); United States v. Berkeness, 275 U.S. 149 (1927); Taylor v. United States, 290 U.S. 41 (1933); Trupiano v. United States, 334 U.S. 699 (1948); Kremen v. United States, 353 U.S. 346 (1957); Jones v. United States, 357 U.S. 493 (1958); Silverman v. United States, 365 U.S. 505 (1961); Mapp v. Ohio, 367 U.S. 643 (1961); Fahy v. Connecticut, 375 U.S. 85 (1963); Clinton v. Virginia, 377 U.S. 158 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Stanford v. Texas, 379 U.S. 476 (1965); James v. Louisiana, 382 U.S. 36 (1965); Camara v. Municipal Court, 387 U.S. 523 (1967); Bumper v. North Carolina, 391 U.S. 543 (1968); Reznick v. City of Lorain, 393 U.S. 166 (1968); Stanley v. Georgia, 394 U.S. 557 (1969); Chimel v. California, 395 U.S. 752 (1969); Win Cleef v. New Jersey, 395 U.S. 814 (1969); Shipley v. California, 395 U.S. 818 (1969); Vale v. Louisiana, 399 U.S. 30 (1970); Connally v. Georgia, 429 U.S. 245 (1977); Riddick v. New York, 445 U.S. 573 (1980); Steagald v. United States, 101 S.Ct. 1642 (1981).

Or apartments, McDonald v. United States, 335 U.S. 451 (1948); Chapman v. United States, 365 U.S. 610 (1961); Riggan v. Virginia, 384 U.S. 152 (1966); Spinelli v. United States, 303 U.S. 410 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Franks v. Delaware, 438 U.S. 158 (1978); Payton v. New York, 445 U.S. 573 (1980).

Or hotel rooms, Johnson v. United States, 333 U.S. 10 (1948); Lustig v. United States, 338 U.S. 74 (1949); United States v. Jeffers, 342 U.S. 48 (1951); Stoner v. California, 376 U.S. 483 (1964).

Or places of business, Silverthorne Lumber Co. v. United States, 255 U.S. 313 (1921); Gould v. United States, 255 U.S. 298 (1921); Go-Bart Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Sgro v. United States, 287 U.S. 206 (1932); Marcus v. Search Warrant, 367 U.S. 717 (1961); See v. City of Seattle, 387 U.S. 541 (1967); Berger v. New York, 388 U.S. 41 (1967); Mancusi v. DeForte, 392 U.S. 364 (1968); Colonnade Catering Co. v. United States, 397 U.S. 72 (1970); G.M. Leasing Co. v. United States, 429 U.S. 338 (1977); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Tyler v. Michigan, 436 U.S. 499 (1978); Lo-Ji Sales Co. v. New York, 442 U.S. 319 (1979); Ybarra v. Illinois, 444 U.S. 85 (1979). Absent exigent circumstances or consent, the threshold may not be reasonably crossed without a warrant.

The rule also protects our "effects." Gambino v. United States, 275 U.S. 310 (1927); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Chadwick, 433 U.S. 1 (1977); Torres v. Puerto Rico, 442 U.S. 465 (1979); Arkansas v. Sanders, 422 U.S. 753 (1979); Robbins v. California, 101 S.Ct. 2841 (1981). America is a mobile society, and while we are obedient to the law, the Constitution guarantees us this.

PUBLIC POLICY MILITATES AGAINST ANY LESSER STANDARD

Besides the constitutional argument that Congress does not possess the authority to nullify the federal exclusionary rule, public policy alone militates against consideration of the proposed legislation. Bluntly, it would exhume the silver platter doctrine, quietly laid to rest in Elkins, and thereby destroy any semblance of uniformity of Fourth Amendment decisional law in all criminal

proceedings, whether federal or state. State prosecutors, having cause to believe that they cannot meet the Mapp/Ker standard of reasonableness, could hand over to the Justice Department illegally seized evidence for use in federal prosecutions. Federal prosecutors, in turn, could persuade a federal court, under any lesser standard, to admit the unconstitutionally seized evidence in the federal prosecution.

Conversely, under any lesser standard, having persuaded a federal court to admit such evidence, the federal prosecutor could hand evidence over to a state prosecutor, since it had been admissible in a federal court; state prosecutors could then try to persuade state courts that, if it were admissible in federal court, it should likewise be admissible in a state court. Chaos would result.

The following analysis by Justice Douglas, joined in by Chief Justice Warren and Justice Brennan in dissenting in Wilson v. Schnettler, 365 U.S. 381, 397-398 (1961), is pertinent:

When we forsake Rea v. United States and tell the federal courts to keep hands off, we wink at a new form of official lawlessness. Federal officials are now free to violate the Federal Rules that were designed to protect the individual's privacy, provided they turn the evidence unlawfully obtained over to the States for prosecution. This is an evasion of federal law that has consequences so serious that I must dissent. This case may be inconsequential in the tides of legal history. But the rule we fashion is an open invitation of federal officials to "flout" about the search warrants required by the Fourth Amendment, to break into homes willy-nilly, and then to repair to state courts. Their evidence, unlawfully obtained by the standards that govern federal officials, may be used against the victim. A few states have exclusionary rules as strict as those commanded by the Fourth Amendment. Many permit the use in state prosecutions of evidence which would be barred if tendered in federal prosecutions. The tender regard which is expressed for federal-state relations will in ultimate effect be a tender regard for federal officials who flout federal law. Today we lower federal law enforcement standards by giving federal agents carte blanche to break down doors, ransack homes, search and seize to their heart's content — so long as they stay away from federal courts and do not try to use the evidence there. This is an invitation to lawlessness which I cannot join. (footnotes omitted)

If one were merely to substitute the words "federal courts" for either "federal officials" or "agents" — which would be the result of any proposed lesser standard — one can readily see the invitation to lawlessness, the future of which Justice

Douglas correctly portended. It also forbodes ill for decisional uniformity among the 50 states.

An additional public policy argument against these proposals arises in another context: the interpretation by the 94 U.S. District Courts and 12 U.S. Courts of Appeals of Fourth Amendment cases predicated on a less-than-reasonableness standard. In other words, should federal courts prospectively admit evidence seized in such egregiously abusive circumstances as the Supreme Court has decisionally forbidden?

- *arrests at will of anyone with only a previous criminal record (Beck);
- *dragnet arrests (Davis);
- *arrests for investigation (Brown v. Illinois);
- *"pick up and bring in" arrests (Dunaway);
- *unreasonable stop and frisks (Sibron);
- *stops based on skin color alone (Brignoni-Fonce);
- *random auto stops (Prouse);
- *unreasonable stop and identify cases (Brown v. Texas);
- *warrantless sanctuary seizures (Payton/Riddick/Steagald);
- *coercive consent searches (Bumper).

The answer should be no, since all these cases were decided post-Mapp.

Twenty years have passed since the U.S. Supreme Court constitutionally mandated the federal exclusionary rule in Mapp. During this period of time, the Court has decided 45 federal cases touching on the rule, holding for the government in 32. On the other hand, with regard to enforcing Fourth Amendment rights through the Fourteenth Amendment in state criminal proceedings, out of 76 cases, it only held for the prosecution 19 times. Federal law enforcement has come a long way toward living and working within the framework of the rule.

ABOLITION OF THE RULE WOULD NOT ENSNARE MANY CRIMINALS NOW GOING FREE

To say that the federal exclusionary rule has not worked is to ignore human experience. It has contributed to substantial law reform by federal authorities. It has increased the professionalism of federal law enforcement officers. It has vastly enhanced the integrity of the federal judicial process.

But perhaps most importantly, empirical evidence reveals that the operation of the rule has not greatly affected case disposition. The overwhelming percentage of guilty pleas and convictions in federal courts provides ample proof that the rule has not stultified either federal law enforcement or the judiciary.

Opponents of the exclusionary rule and many citizens believe the rule results in legions of criminals going free on "technicalities." Evidence from a recent General Accounting Office report strongly suggests otherwise. See

Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. GGD-79-45 (19 April 1979). The report outlines evidence obtained from a survey conducted between July 1 and August 31, 1978 in 38 U.S. Attorneys' Offices. Some 2,804 cases were evaluated. Sixteen percent of defendants whose cases were accepted for prosecution filed some type of suppression motion; 55% of these motions cited the Fourth Amendment. The overwhelming majority of motions for suppression in which hearings were held were denied. Overall, in only 1.3% of the 2,804 cases was evidence excluded as a result of filing a Fourth Amendment motion.

But were many cases dropped by the prosecutor because of search and seizure problems? The answer is no. Only 4/10 of 1% of the declined defendants' cases were turned down due to Fourth Amendment search and seizure problems, the GAO study reported.

Further evidence can be found in two studies of state cases from the prestigious Institute for Law and Social Research. In a May, 1978 study, "What Happens After Arrest?", INSLAW researchers reported "a low rate of rejections at screening due to improper police conduct. Less than 1% of all arrests were refused by the prosecutor with an indication that the police failed to protect the arrestee's right to due process (e.g., no probable cause for making the arrest, unlawful search for and seizure of evidence...)." And of the 8,766 arrests examined in the INSLAW study that were dismissed by the prosecutor after initial acceptance, due process problems constituted but a small part — 2%.

A second INSLAW study is also revealing. Issued in April, 1979, it is entitled, "A Cross-City Comparison of Felony Case Processing." While noting that the exclusionary rule and other related issues have stirred much debate among both scholars and criminal justice practitioners, and acknowledging that the rule may legitimately be the subject of extended debate over legal philosophies, the study found that due process reasons appeared to have "little impact on the overall flow of criminal cases after arrest."

Due process reasons were responsible for only a tiny portion of the rejections of cases at screening in most jurisdictions — 1% in Washington, D.C., 2% in Salt Lake City, 4% in Los Angeles, 9% in New Orleans. The study goes on to point out that the data "seem to counter the conventional wisdom that Supreme Court decisions cause many arrests to fail because of technicalities. In fact,

in the jurisdictions [studied], only one homicide arrest was rejected for due process reasons, and no rapes were rejected for these reasons." Drug cases accounted, not unexpectedly, for most of the due process-related rejections. In non-drug felony cases, less than 2% of the rejections in each city stemmed from due process violations.

Under these circumstances, is the effort to nullify or severely limit the exclusionary rule necessary? Would its abolition result in many more cases being pursued? The data do not suggest so.

Discontent with the outcome of one or two well-publicized cases in which suppressed evidence has resulted in a criminal going free -- and one can always come up with these "horror stories" -- is no reason to tamper with constitutionally guaranteed rights.

CONCLUSION

Despite the rhetoric, there is no demonstrated connection between the increase in crime and the existence of the exclusionary rule. Lawbreakers do not read the Supreme Court advance sheets; and the empirical evidence does not support the thesis that many cases are either lost or dropped because of search and seizure problems.

Efforts to abolish or narrow the exclusionary rule are unconstitutional, unwarranted and unnecessary.

The American Bar Association joins with members of this Administration and the Congress in recognizing the need to undertake concerted and effective measures to reduce crime in America. We have joined in endorsing a number of the Administration's proposed measures to achieve that end. The exclusionary rule, however, provides an easy target for many who are -- understandably -- fed up with the crime problem today. But Congressional changes in the Rule will undercut law enforcement professionalism, engender decades of litigation over various new tests, and result in very few additional criminals ending up behind bars.

And, in the bargain, we will -- perhaps forever -- have casually tossed aside a valued constitutional protection on which this country was founded.

ATTACHMENT: APPENDIX A - 1963 ABA Exclusionary Rule Policy

APPENDIX A

Approved ABA House of Delegates
Midyear Meeting, 1973

AMERICAN BAR ASSOCIATION

SECTION OF CRIMINAL LAW

RECOMMENDATIONS

The Section of Criminal Law recommends adoption of the following Resolutions:

BE IT RESOLVED, That the American Bar Association oppose, in principle, Senate Bill No. 2657, 92d Congress, 1st Session, as amended, entitled A Bill "To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal Criminal proceedings"; and

BE IT FURTHER RESOLVED, That the American Bar Association affirm its support of the exclusionary rule in State and Federal criminal proceedings; and

BE IT FURTHER RESOLVED, That the Chairman of the Section of Criminal Law, or his designee, be authorized to appear before appropriate committees of the Congress in order to communicate the Association's opposition to said legislation and the reasons therefor.

REPORT

Introductory. Senate Bill No. 2657 was introduced by Senator Lloyd Bentsen, of Texas, October 6, 1971, and referred to the Committee on the Judiciary. In view of the brevity of the bill and to facilitate action upon these recommendations, the bill is being quoted in its entirety, as follows:

"A BILL

"To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 223 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 3505. Definition and limitation of exclusionary rule

"(a) Evidence shall not be excluded from any Federal criminal proceeding solely because that evidence was obtained in violation of the fourth amendment of the Constitution, unless the court finds, as a matter of law, that such violation was substantial.

"(b) In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including--

- "(1) the extent of deviation from sanctioned conduct;
- "(2) the extent to which the violation was willful;
- "(3) the extent to which privacy was invaded;
- "(4) the extent to which exclusion will tend to prevent such violations;
- "(5) whether, but for the violation, the things seized would have been discovered; and
- "(6) the extent to which the violation prejudiced the defendant's ability to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.

"(c) The analysis of such chapter is amended by adding at the end thereof the following new item:

"3505. Definition and limitation of exclusionary rule."

S. 2657 was amended by Senator Bentsen December 13, 1971, as follows:

"At the end of the bill, add the following new sections:

"SEC. 2. (2) Title 28, United States Code, is amended by adding after chapter 171 the following new chapter:

"Chapter 172.--ILLEGAL SEARCH AND SEIZURE

"Sec.

"2691. Definitions.

"2692. Tort claims; illegal search and seizure.

"2693. Judgment as a bar.

"2694. Attorney fees; penalty.

"§ 2691. Definitions

"As used in this chapter and sections 1346(f) and 2401(b) of this title, the term--

"(1) "Federal agency" includes the executive departments, military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States; and

"(2) "employee of the Government" includes officers of employees of any Federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a Federal agency in an

official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"§ 2692. Tort claims; illegal search and seizure

"(a) The United States shall be liable for an illegal search and seizure conducted in violation of the Constitution by any employee of the Government, or by any person acting under him, or at his direction or request, or by any person whose compensation is paid in whole or in part by the United States.

"(b) Punitive damages may be recovered against the United States in a civil action undertaken pursuant to this section. No award, compromise, or settlement of the civil action brought under this section shall exceed the amount of \$25,000, including actual and punitive damages.

"§ 2693. Judgment as a bar

"The remedy against the United States provided by this chapter for an illegal search and seizure shall be exclusive of any other civil action or proceeding by reason of the same subject matter against any of the persons described in section 2692 whose act or omission gave rise to the claim.

"§ 2694. Attorney fees; penalty

"(a) An attorney shall not charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(f) of this title.

"(b) Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year or both."

"(b) The analysis of part VI of such title 28 is amended by adding immediately after item 171 the following new item:

"172. Illegal Search and Seizure.....2691".

"SEC. 3. Section 1346 of title 28, United States Code, is amended by adding immediately after subsection (e) the following new subsection:

"(f) The district courts, together with the United States Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, brought under chapter 172 of this title."

"SEC. 4. The civil action against the United States provided by the amendments to title 28, United States Code,

made by this Act shall only apply to claims arising on or after the date of enactment of this Act."

"On page 2, line 15, insert quotation marks after the period.

"On page 2, line 16, strike out the quotation marks and '(c)' and insert in lieu thereof '(b)'

"Amend the title so as to read: 'A bill to amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings, and to amend title 28, United States Code, to extend the tort liability of the United States'."

According to remarks reprinted in the Congressional Record for the Senate October 6, 1971, Senator Bentsen was at least motivated in part by statements of Chief Justice Burger's dissent in the case of Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (9 CLR 3195 at 3202-3207) when he stated:

"Recently, in his opinion in the Bivens case, Chief Justice Burger challenged the Congress to take up the problems posed by the exclusionary rules and to provide some legislation.

"This is exactly what my bill intends to do. It would provide the courts with an opportunity to weigh the gravity of the crime charged to a defendant and then consider the seriousness and circumstances of the offense in seizing or searching for evidence. The court would then make a relative decision on the admissibility of the evidence involved.

"In substance, I propose that the courts be given greater latitude in decisions on admissibility of evidence."

The Section of Criminal Law initially submitted a report in opposition to the principle of Senate Bill No. 2657 which was intended to be on the calendar of the House of Delegates at the February, 1972, Midyear Meeting. At the time the Council of the Section acted on this matter (November 13, 1971), the amendments had not been offered. Consequently, the Board of Governors recommended that the report be returned to the Section for further consideration in the light of the amendments; and the Section, in agreement with the Board's recommendation, withdrew the report.

Thereafter, at its Council meeting at Denver, Colorado, April 29-30, 1972, the Section voted, 12 to 6, in favor of the recommendations contained in instant report; and further agreed, in the interest of presenting the issues fully for consideration by the House of Delegates, to submit both a majority and minority report, both of which are contained herein.

Majority report in favor of the recommendations submitted by the following:

Chester Bedell
George D. Crowley
Samuel Dash
Albert J. Datz
Jack G. Day
Robert M. Ervin

Roger L. Keithley
Walter F. Rogosheske
Gilbert S. Rosenthal
George Shadoan
Thomas R. Sheridan
Paul E. Wilson

Bluntly put, Senate Bill 2657, introduced by Senator Lloyd Bentsen, of Texas, is a legislative proposal to do away with the exclusionary rule of evidence. Although the bill purports to preserve the exclusionary rule in cases where there is a "substantial" violation of the search and seizure provisions of the Fourth Amendment, the six criteria set forth in the bill for the determination of substantiality will provide any judge with a basis for admitting practically all illegally seized evidence. A substantial majority of the members of the Council believe that such a legislative provision would be in direct violation of the Constitution of the United States as it has been interpreted by the Supreme Court of the United States. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court held that the exclusionary rule of evidence was an integral part of the Fourth Amendment of the United States Constitution. In the face of such a holding, it is clear that Congress cannot by legislation remove or reduce the application of the exclusionary rule in our system of criminal justice.

It is important to remember that the Supreme Court did not move hastily in imposing the exclusionary rule of evidence as a constitutional requirement for the States. It waited 12 years after its decision of Wolf v. Colorado, 338 U.S. 25 (1949), which held that the search and seizure provisions of the Fourth Amendment were applicable to the States through the Fourteenth Amendment, but declined to impose on the States, at that time, the Federal exclusionary rule enunciated in Weeks v. United States, 232 U.S. 383 (1914). In 1949, the Supreme Court in the Wolf case, *supra*, wanted to permit the States as "laboratories" to experiment with alternative remedies to the exclusionary rule. During these years when the Supreme Court held back, such alternative "remedies" to the exclusionary rule as internal police discipline procedures, prosecution of police and private tort actions proved utterly worthless. Actually, those States that wished to have an effective remedy against illegal search and seizure practices by the police chose the exclusionary rule. By 1956, 23 States had abandoned other methods of enforcing search and seizure protections in favor of the exclusionary rule in the hope of shaping police conduct to conform to constitutional standards. See Annot. 50 A.L.R. 2d 531, 556 *et seq.* (1956).

In States which did not provide such a remedy, as the exclusionary rule, constitutional search and seizure protections were nothing more than an empty promise. The Supreme Court became aware of this in Irvine v. California, 347 U.S. 128 (1954), which presented so shocking a case of illegal police practices in the search of a home in Los Angeles that it led Mr. Justice Jackson to exclaim:

"That officers of the law would break and enter a home, secrete such a device, even in a bedroom, and listen to the conversation of the occupants for over a month would be almost incredible if it were not admitted. Few police measures have come to our attention that were flagrantly, deliberately, and persistently violating the fundamental principles declared by the Fourth Amendment as a restriction of the federal government that 'the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person and thing to be seized'."

Nevertheless, the court still patiently followed its cautious approach taken in Wolf v. Colorado, supra. However, shortly afterwards, the Supreme Court in California, itself, imposed its own exclusionary rule on the State when it experienced a repetition of the Irvine-type illegal police practices in People v. Cahan, 44 Cal. 2d 434 (1956).

Finally, in 1961, the Supreme Court in Mapp, supra, held that the only way to give real meaning to the protections afforded by the Fourth Amendment was to no longer "consistently tolerate denial of its (Fourth Amendment) most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure." "To hold otherwise," the Court stated, "is to grant the right but in reality to withhold its privilege and enjoyment."

Speaking eloquently for the Court, in Mapp v. Ohio, Mr. Justice Clark upheld imposing the sanction of the exclusionary rule on unlawful police conduct by referring to the following fundamental philosophy:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 1928, 277 U.S. 438, 485, 48 S. Ct. 564, 575: 'Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . if the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'"

Mr. Justice Clark also pointed to the long successful history of the Federal Bureau of Investigation in combating crime despite the existence of the federal exclusionary rule, as proof that it cannot "lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement." It is worth quoting Mr. Justice Clark's stirring closing language of his opinion in Mapp justifying the holding of the court that the exclusionary rule was an integral part of the Fourth Amendment to the United States Constitution. He stated:

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having

once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It is important to recognize that the right to privacy guaranteed by the Fourth Amendment, with the integral support of the exclusionary rule, is not a right provided for criminals. It is a right enjoyed by all people in the United States. It protects the homes and offices of every one of us from illegal police intrusions. This constitutional safeguard is equally aimed at illegal government action in the anti-trust field, the income tax field and the regulation of business and industry.

Now a little over 10 years after Mapp it is claimed that the exclusionary rule has not worked. There is no empirical data to conclusively establish this. Such proof is not found in Professor Oaks article, studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi. L.R. 665 (1970). His article states that the evidence is not conclusive, although, in pages 678 through 709 and especially the summary of findings on pages 706 through 709, sets forth a good deal of statistical data challenging the effectiveness of the exclusionary rule. For example, he cites a study of arrests and convictions for seizures of property in Cincinnati, Ohio, before and after the Mapp decision as showing no significant changes in police behavior. The majority position of the Council is that in actuality there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends legal police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the Mapp decision, any cases revealing such outlandish police practices as took place in California in the Irvine and Cahan cases, with the exception, perhaps, of the revelation of illegal Federal wiretapping practices in the 1960's.

Indeed, if it is assumed that police intend to be both rational and lawful, and any other assumption is insupportable, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegal acquired evidence. Furthermore, the overwhelming percentage of

pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time there is no demonstrated connection between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available. For these reasons, it is our considered view that the exclusionary rule, while no panacea, is, of all the available alternatives, most likely to motivate police conduct in a lawful direction.

It is now argued that the amendment to the Bentsen bill, which provides a tort remedy against the government for a victim of an unlawful search and seizure by the police, is a new and alternative remedy to the exclusionary rule. Actually, this is merely the old private law suit remedy trotted out once again. It may be true that one has a greater chance of recovering money from the government than from an individual police officer, but there is no assurance that such suits can be successfully brought, or that judges and juries will be inclined to grant more than normal damages. There is the further question of whether the payment by the government of some damages can serve as a deterrent to individual police officers. Given the likelihood of infrequent law suits and insubstantial damages where suits may be brought, government officials may be willing to pay damages occasionally to gather the fruits of illegal searches and seizures to secure convictions.

We would be in favor of a separate enactment by the Congress of the tort action remedy against the government for a victim of an illegal search and seizure by law enforcement officers, without at the same time removing or reducing the application of the exclusionary rule. Such legislation would permit us to obtain a record of experience concerning whether, in fact, it is an effective alternative remedy to the exclusionary rule. If it proves to be so, then it is time to consider the question of whether the exclusionary rule is still needed. But in the absence of such information, Mr. Justice Clark's reasoning for making the exclusionary rule an integral part of the Fourth Amendment to the Constitution is just as applicable today as it was in 1961.

It is therefore the position of a substantial majority of the members of the Council of the Section of Criminal Law that any modification of the exclusionary rule is a question solely for the decision of the Supreme Court of the United States, and that the American Bar Association should oppose any effort by Congress to legislate constitutional criteria for the admissibility of illegally seized evidence when the Supreme Court, as of now, has permitted no such legislative tinkering with Fourth Amendment protections.

Senator MATHIAS. Our next witnesses are Mr. Carrington and Mr. Nicholson, who will testify as a panel.

Gentlemen, have you agreed on your order of presentation?

Mr. CARRINGTON. We have, Mr. Chairman. We did it alphabetically, and I will go first.

Senator MATHIAS. Your statements will appear in full in the record, and you can summarize them and comment in such a manner as you please.

**STATEMENT OF FRANK CARRINGTON, EXECUTIVE DIRECTOR,
CRIME VICTIMS LEGAL ADVOCACY INSTITUTE, INC.**

Mr. CARRINGTON. Thank you, sir.

I will briefly summarize the single point made in my statement. The reason that it is the single point is because I believe that the hearings are the most comprehensive that I have seen dealing with the exclusionary rule of any deliberative body, and I think you are going to hear at these hearings every argument pro and con on the exclusionary rule. For brevity's sake, and to save the subcommittee's time, I do not want to duplicate the arguments made by Mr. Jensen and Professor Schlesinger.

So I am going to zero in on one single issue that has not really been raised a number of times in the exclusionary rule argument, and to me it is the threshold issue, the linchpin issue.

If we are talking about deterrence, and I think most people concede that that is the principal rationale for the exclusionary rule, you reach a question at the outset, not whether the exclusionary rule deters unlawful police conduct, but, logically speaking, can the exclusionary rule deter unlawful police conduct?

I raise this question based on the rather obvious logical proposition that for somebody to be deterred from doing something, Mr. Chairman, he has to know what it is he is supposed to be deterred from doing, and I submit to the subcommittee that in this country today, the law of search and seizure is so complex, so convoluted, so conflicting and confusing, that the policeman on the street, who is untrained in the law, as such, literally cannot know what it is he is supposed to do or what he is not supposed to do.

As evidence of this, Mr. Chairman, I would like to turn to the Supreme Court itself. They are the constitutional interpreters of the law in every area that we deal with in this particular instance, the law of arrest, search and seizure. To give you some of the confusion that lies at the highest judicial body in the land, let me read for the record a syllabi from two cases, *Coolidge v. New Hampshire*, and *United States v. Mendenhall*. The syllabus, of course, is the recitation by the reporter of how the justices voted.

In *Coolidge v. New Hampshire*, the syllabus reads:

Mr. Justice Harlan concurred in parts of the opinion and in the judgment and filed an opinion. Mr. Justice Black concurred in part and dissented in part in which Mr. Justice Blackmun joined in parts II and III and in portion of part I. Mr. Justice White concurred in part and dissented in part in which Mr. Chief Justice Burger joined. Mr. Chief Justice Burger dissented in part and concurred in part and filed opinion.

Senator MATHIAS. It sounds like a meeting of the Senate Judiciary Committee explaining their votes as we are calling the roll.

Mr. CARRINGTON. Precisely, Mr. Chairman, except the Senate Judiciary Committee is not setting down rules that high school graduate policemen are supposed to obey with rigid adherence on the street, but the Supreme Court is.

Mendenhall might even be better. The syllabus reads:

Stewart, J., announced the Court's judgment and delivered an opinion of the Court with respect to parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, J., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, J. J., joined.

Mr. Chairman, this leads to the conclusion that when the Justices of the Supreme Court of the United States not only can't agree on the holding of a given case, and they can't even agree about parts and subparts of the case, you have such a confusing situation that it is unrealistic to expect the policeman on the street to be able to draw any sort of finite guidelines.

The top constitutional interpretation is the Supreme Court, and then you multiply that by the factor of the interpretation of hundreds of appellate court judges, and thousands of trial judges, I submit to you that the question of what is or is not a legal or an illegal search is such a morass that the logical question that I propound to you comes into play: How does the policeman know what he is supposed to be deterred from doing.

Professor Kamisar and Professor Greenhalgh talk about reasonableness, but that is circular because reasonableness is what is what the Supreme Court says is reasonable, in many cases, and the Supreme Court can't seem to agree on what it thinks is reasonable. You leave the officer in a quagmire.

I think it also should be mentioned that the decisions made about search and seizure cases are made in very pleasant and relaxed surroundings, like this chamber or judicial chambers. The policeman is out there on the street. He may have minutes, perhaps even seconds, to make a decision. Should he stop the car? Does he have probable cause to stop the car? Should he stop somebody in an alley?

He is operating under the acknowledged dangers and stresses of police work. He is operating without the benefit of a law degree and a legal education. For these reasons, I feel that deterrence is simply impossible in the majority of cases.

There are, of course, a few clear-cut areas. You cannot go search every apartment in an apartment building because you think a person has run in there. That is clear enough. Of course, you can't use tainted or perjured evidence, fabricated evidence to support a search warrant, but once you get away from these very clear egregious situations, I don't think that a person can be deterred if he doesn't know what he is supposed to be deterred from doing.

That is the thrust of the logical argument, and I submit to you, Mr. Chairman, that it is the opposite of the coin of the good faith argument. It must be borne in mind, I think, in any discussion of the exclusionary rule, that the policeman is out there protecting a society that expects him to act.

A policeman, of course, could resolve the dilemma by simply never making an arrest or a search and seizure. But that is not

what our society demands of him. He is out there to protect society, and they expect him to act. But if he acts in a vacuum of such conflicting rules all the way from the Supreme Court on down, that I really don't think he can logically be deterred.

I think that the other side of that is, when he tries to conduct himself in the area of arrest, search, and seizure in good faith, then this should be given weight.

I would like to address the argument that has been made here, which I think is entirely specious, that a good faith exception to the exclusionary rule would be a totally subjective exception. It is precisely the opposite. I refer to the case of *People vs. Adams* decided by the New York Court of Appeals.

Senator MATHIAS. Good faith is a subjective matter; isn't it?

Mr. CARRINGTON. Excuse me, sir?

Senator MATHIAS. Good faith is a subjective matter; isn't it?

Mr. CARRINGTON. But the good faith test is not a subjective test. A policeman could not justify a search that was patently unjustifiable; say, shaking down everybody on the street who is wearing a green shirt, by saying, "I believed in good faith that what I was doing was right." That is not what the law says.

It is a two step test, Mr. Chairman, the subjective good faith of the officer and the objective evaluation of good faith made by the tribunal that is judging the officer's conduct. The language from *People v. Adams* from the New York Court of Appeals, in which they refused to suppress evidence of a shotgun seized by police who believed in good faith that the person who gave them consent to enter the apartment had the right to do so is instructive. It was also an exigent circumstances case.

The court said that the policemen believed in good faith they had the right to go in because the perpetrator's girl friend told them that she consented. She did not actually, as a matter of law, have the right to consent, but this was found out in hindsight. The court refused to suppress the evidence, and they said this: "We emphasize that the police belief must be reasonable based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers."

I believe that that is what Mr. Jensen was getting to, and I think that all of us who promulgate the suggestion that Congress enact a "good faith" exception to the exclusionary rule would not want to go farther than that. It is a subjective belief which must be buttressed by the objective view of the tribunal. That was the view in the *Williams* case.

It was the view in *Commonwealth v. Richmond*, where the Kentucky Court of Appeals refused to suppress evidence where a search warrant was issued outside of the jurisdiction, but both the magistrate and the police officers believed they had jurisdiction.

Senator MATHIAS. You said, if an officer decided to search everyone in a green shirt that that would be on its face not be good faith. Let me spin this out a little bit. Suppose he could say, "But, I was watching the Today Show this morning, and I heard that the robber had, in fact, been described as wearing a green shirt. So I go out on the street, and I stop everybody wearing a green shirt on the theory that it might be this guy."

Mr. CARRINGTON. No tribunal that I can think of, sitting in judgment of that officer's conduct, would make an objective determination that he was acting in good faith. You see, it is a two-pronged test.

Professor Greenhalgh suggests that this would leave the determination entirely to the subjective view of the officer, and I submit that under the specific ruling in the *Adams* case, as I have read to you, you must have on top of the officer's subjective good faith the objective view of the tribunal viewing the facts.

Certainly, speaking for the Crime Victims Legal Advocacy Institute, and as a member of the Attorney General's Task Force on Violent Crime, if a good faith law were to be drafted, I would have no objection whatsoever to incorporating this language from the New York court into it almost verbatim.

In other words, it would read: "Evidence shall not be excluded if the officer was acting in good faith based upon an objective view of the circumstances present, and that objective view would be taken by the reviewing tribunal.

Senator MATHIAS. I don't want to be curt, but I want to be sure that I understand this. Under your interpretation, then, you really could have a situation where the officer did, in fact, act in good faith, but where the court viewing it, as you say, objectively, would conclude that it wasn't good faith.

Mr. CARRINGTON. Precisely. This also addresses the "put a premium on ignorance" argument that Mr. Sachs made. They say, if you put in a good faith exception, it would put a premium on ignorance. I think, there, first of all, I have been a lawyer for 20 years, and I have master of law degree in criminal law, and I teach search and seizure at various universities.

When I was a street policeman, I had the same credentials, and I did not know when I was making a search and seizure. Even with a law degree and extensive study in the area, the facts and circumstances of each search and seizure are so volatile that except in extreme cases, one way or the other, where I knew that we did have probable cause, we did have a search warrant, or I knew that there was just no justification to make the search whatsoever.

I didn't know this, and then you translate this into the policeman on the street, which I was, who is not trained in the law, and has had, let us say, 60 hours of constitutional law, which was the course at the Denver Police Department when I taught there, you still have this uncertainty as to every search and seizure you make, I would say, in approximately 80 percent of the cases.

So the premium on ignorance argument, I think, falls down. The ignorance is there, but it is not an ignorance created by the police officer. It is an ignorance created by the confusing and complex nature of the search and seizure.

So, I can see a case where an officer might allege that he made a search in good faith, the green shirt example for instance, but the court comes in and puts in the objective standard that your good faith was simply not reasonable. It is a two-pronged test. It is used routinely now in civil cases of false arrest, false imprisonment, illegal search and seizure.

It is the *Bivins* decision by the second circuit after the Supreme Court remanded in its famous *Bivins v. Six Unknown Named Nar-*

cotics Agent cases. They say there is a two-pronged test: First, did the officer believe in good faith he had probable cause, but second, and this is most important, does the trier of law or fact believe, in an objective view of the policeman's conduct, that this good faith belief was reasonable.

So I really think that when people talk about the good faith going entirely to the subjective mind of the policeman, they are totally misinterpreting the law. As I said, I would be quite willing to see that language put into any such law, so that it is cast-iron in there that the test is two-pronged, subjective good faith on the part of the officer, and an objective test of was the good faith reasonable.

Mr. Chairman, turning to the final point on the constitutionality of what the Congress of the United States can do, I think the answer to that lies in Chief Justice William Howard Taft's classic phrase, "The law is what the Supreme Court says it is." Just because they engrafted the exclusionary rule onto the States in *Mapp v. Ohio* in 1961 doesn't mean for a minute that they can't ungraft it if they so desire.

You have the Chief Justice in the *Bivins* case who literally invited the Congress of the United States to come up with an alternative to the exclusionary rule, Justice White, in his dissent in *Stone v. Powell*, Justice Blackmun in concurring with the Chief Justice in his dissent in *Bivins*, and Justice Powell in, I believe, his opinion in *Schneckloth v. Bustamonte*, are all on record. Mr. Justice Rehnquist has also expressed opposition to the rule. So we see four or five Justices of the Supreme Court, that they might vote to modify the exclusionary rule, or in the case of the Chief Justice to do away with it entirely.

So I think that perhaps the benefit of an enactment in the Congress of the United States to set up closely guarded parameters, which is the function of the legislative body, and then give the Supreme Court an opportunity to interpret this law.

I think it would be a tremendous service to clear up the law, if the Congress were to enact the most carefully drawn statute, and then let it be tested. There is precedent for this, Mr. Chairman. Title II of the Organized Crime and Safe Streets Act of 1968, in effect, overruled *Miranda*. It said in effect: The giving of the warnings in a confession situation shall be only one element to be determinative of whether that confession should be suppressed. Title II has not been tested by the court, except in one case that I know of in the southern district of New York, where it was upheld.

But for somebody to say that the Supreme Court has spoken, therefore, it is cast in bronze, and the Congress of the United States cannot tamper with this ironclad decision, I think, is not a correct argument, Mr. Chairman. I think the Congress has the authority to do so, and I think it would be helpful to the Court.

We know that they are going to come to grips with the exclusionary rule. They have two exclusionary rule cases before them now, *Taylor v. Alabama*, and *United States v. Ross*. Sooner or later, they are going to come to grips with the question of the exclusionary rule. If they had a valid Federal statute to use as a guideline, and then a good clean case to go up under that statute, I think it would be extremely helpful to the Court. I think it is absolutely, totally

within the prerogative of this deliberative body to enact such a law.

SUMMARY

One aspect of the deterrent argument with regard to the exclusionary rule, which has received little attention in the past, is whether, under general principles of logic or commonsense, law enforcement officers can be deterred from illegal conduct by the threat of suppression.

It is axiomatic that a person cannot be deterred from doing something if he does not know what he is to be deterred from doing and the submission is that the law of search and seizure is so complex, confusing, convoluted, and conflicting, that law enforcement officers can't know what they are supposed to do or not do in the majority of cases.

This is made patent by the fact that the Justices of the Supreme Court can't seem to agree among themselves on most search and seizure questions; then, multiply this confusion by the individual interpretations of hundreds of lower appellate and thousands of trial judges, and the policeman on the street, untrained in the law, is presented with a morass of legal uncertainties.

The current trend by some courts to carve out a "good faith" exception to the exclusionary rule seems to take this into consideration; the "opposite side of the same coin" as it were.

I think that concludes what I have to say. I would be happy to submit to you a memorandum of law on the Justices' views as they have enunciated them in their concurring and dissenting opinions on the exclusionary rule.

Senator MATHIAS. We will be happy to have it. I will withhold my questions to you until Mr. Nicholson has spoken.

Mr. CARRINGTON. Thank you, sir.

Senator MATHIAS. Would you proceed, Mr. Nicholson.

STATEMENT OF GEORGE NICHOLSON, SENIOR ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, STATE OF CALIFORNIA, ON BEHALF OF LAWS AT WORK

Mr. NICHOLSON. Thank you, Mr. Chairman.

My name is George Nicholson. I am a senior assistant attorney general of the State of California currently. Prior to that, I spent 3 years as executive director of the California District Attorneys Association, and 10 years as a trial prosecutor in California. I mention that just briefly because I tend to bring a different perspective to you this morning.

Senator MATHIAS. As a former assistant attorney general of Maryland, I take a special pleasure in having you here.

Mr. NICHOLSON. Thank you very much.

Mr. Chairman, I am so honored and happy to be here with you, both in my personal capacity and on behalf of Laws at Work. Laws at Work is a public service, nonprofit, citizens organization in California. It has been in existence for 15 years, and during that period of time it has devoted its resources and efforts and the efforts of its distinguished membership to improving the administration of justice, primarily from the point of view of improving public safety.

During those 15 years, they have conducted four particularly relevant conferences for this hearing today. These conferences were conducted by eminent members of the judiciary in California and from throughout the country, and the issue they addressed, in part, was whether or not the exclusionary rule should be retained. It was the unanimous consideration of all of those conferences that the exclusionary rule had to go.

Not only has the Attorney General of the United States currently expressed himself on the exclusionary rule, but in a letter to Laws at Work in September of this year, the President himself indicated the exclusionary rule has not served its function and, therefore, ought to be altered.

That is, in part, premised obviously upon the recent report of the Attorney General's Task Force on Violent Crime, but it is also premised in part, in my view, on the President's experience with Laws at Work. He was the catalyst in all four of those prior conferences held in California.

With that brief background, Mr. Chairman, I should add there are two particularly troublesome points of view here that I would like to address. One is the argument that it would detract from the integrity of the courts if they were to allow exclusionary to go by the boards, and pursue some other remedy. In other words, according to the proponents of the exclusionary rule, somehow the courts would have dirty hands by allowing "tainted" evidence in.

The other argument is deterrence, which Frank Carrington just spoke about. There can be no worse position for the courts of America, both State and Federal, to occupy than that of places where trials go before triers of fact, whether they are trial judges alone or whether they are juries of 12 persons selected from the public, and to keep from these triers of facts relevant facts which are needed to decide what happened, when it happened, and who did it in particular criminal cases.

By that I mean, very simply put, Mr. Chairman, that the courts of this country are involved in a dirty business of the most serious kind when they take a case or allow a prosecutor, or require a prosecutor to take a case to a trier of fact without all of the relevant evidence, so that the trier of fact can fairly and objectively decide the case.

In terms of the deterrence argument, I must ask how peace officers are deterred from anything in a personal sense because they rarely, if ever, hear about the results of their efforts in a timely fashion. It is sometimes months, sometimes years after the fact that the fruits of their work comes before trial courts and, in particular, appellate courts.

Professor Greenhalgh talked about studies which have been conducted that indicate how insignificant search and seizure rulings are in motions to suppress. I have a question there as well.

If only 1.3 percent of those particular motions that are heard, which were something like 60 percent of the actual cases that went to trial, if there are so few suppressions of evidence, why are we devoting such a great amount of our time and effort to conducting those hearings?

If, on the other hand, it is the innocent citizen, who is arguably subjected to a violation of the fourth amendment, where is his

remedy? I am referring to the innocent citizen against whom no evidence is found, and thus no criminal charges brought, and thus who has no opportunity to pursue a fourth amendment exclusion of evidence suppression motion. So the whole thing is ambiguous and circuitous to me as far as how the innocent citizen is protected.

The professor warns that if there were no exclusionary rule, a citizen who leaves these chambers, goes out into the street and around the country-side would be subjected to improper and misbehaving peace officer everywhere they went, whether it might be in and about the Capitol, in and about the White House, or the Library, on the street, or anywhere. That doesn't make a bit of sense because there is no evidence that throughout this country prior to 1914, or prior to 1961 in the States, peace officers were behaving in that kind of fashion.

One example is the airports. We currently have a situation where peace officers at airports can conduct searches of everyone going in, and it seems to me the public that flies our airways welcome this as an opportunity to fly safely, which brings me to another point.

Throughout the country, Mr. Chairman, in California and everywhere in this great Nation, people are locking themselves in their homes, and the question I would like to ask is: Are they locking themselves in from misbehaving peace officers, or are they locking themselves in from criminals?

The point is, the exclusionary rule does inhibit fair and effective investigation of crime, as well as fair and effective prosecution of crime, because the studies that reflect that very few motions are made and that very few motions are granted, don't fairly review and characterize what is going on in the country, No. 1.

Not only do prosecutors screen the cases, and cull out many of those cases which have search and seizure problems at the outset, but peace officers themselves, to the extent they are able to decide from what Mr. Carrington has outlined for you, often don't investigate cases and don't develop them at all, and thus don't get them to the prosecutor's office because, on the one hand, a technical rule is in place and they understand it; or, on the other hand, a technical rule is in place and they don't understand it. In either or both circumstance, they are prevented and deterred from properly and fairly protecting the public.

I share with you, Senator Mathias, the idea that what we are trying to do in America is to make the fourth amendment a very real part of our society, and protect everyone from improperly behaving peace officers. But I believe the bulk of the peace officers in this country are behaving police officers. They are highly moral and motivated people. They are trying to do the best they can, and we have interposed upon them a highly technical, artificial, almost impossible to understand structure, such that, as hard as they may try, they are not effectively protecting the public.

Senator MATHIAS. Let me interrupt you to say that I share that view of the law enforcement officers in the country today. I know a great many of them personally, and I have a very high respect and regard for their motivation, their patriotism, and the sacrifice they make and, let me say, the sacrifice their families make, because they live lives of risk and uncertainty, uncertainty as to the future

as well as uncertainty as to the hours of the day on which they can count on being home and with their families.

So, I have enormous respect and regard for them. I would only say this, however, those are the people who are there today. When we make law, particularly organic law, we have to also think about tomorrow.

I think that this is what Jefferson had in mind when he said, if men were angels, you would not need law. But since they are not, you need to bind them down with the chains of the Constitution. So it is not the good people we know today, it is the less certain people of tomorrow that we have to give some thought to, if we want to think about the future of your son, who is with you here this morning.

Mr. NICHOLSON. I could not agree with you more, but I think we have to place more faith in the peace officers that are there, particularly their leaders, in the selection of their successors in this sense.

The search and seizure rules we have, and the exclusionary rule in particular, are a bankrupt situation. They have, in effect, subverted the function of justice from one in which the courts seek truth, to one in which the courts often nitpick on the issue of a particularly technical peace officer violation, which may or may not have existed at the time the peace officer behaved.

My point being this, what we have has not and is not working currently. If we were to try something different, and to experiment both at the national level and in the various States, it is not to say that we can't then try something different if any of those efforts are found wanting. But to wed ourselves in the sense of forever and never be able to change the exclusionary rule is unwise in my view, because it is not working, and because there certainly has to be a better way. Where else in the world is there such a rule?

Senator MATHIAS. Where else in the world is there a document like the Constitution of the United States?

I have the greatest respect for the British system of government, and the British system of justice, but there are not nearly the restraints against government in Great Britain that there are in this country.

The Parliament, if it chose to do so, could pass a bill of attainder against all red heads, and I see at least one wince in the audience at that thought. Parliament could condemn all red heads, and there is no restraint of any sort that would stand against that as a legal question. There may be the innate sense of justice of the British people who would rise, and throw the Parliament out.

I think you are right, where else in the world is there a rule like this? But then, where else in the world is there a document as remarkable as the Constitution of the United States?

Mr. NICHOLSON. When I talk about where else in the world, I am talking about the remedy, the exclusionary rule. In terms of talking about the fourth amendment, I really have to stand by the idea that the fourth amendment is going to remain inviolate if the exclusionary rule itself were to be abolished. The point being, I am criticizing the remedy, and not the fourth amendment rule.

In fairness to the exclusionary rule, it is not an appendage to the Constitution. So when you use that phraseology, where else in the

world is there such a Constitution; I agree with you, where else. But even in that Constitution that we have, there are no words creating the exclusionary rule.

Senator MATHIAS. You are anticipating a question that I was going to ask both you and Mr. Carrington as to where your thinking lies as to whether or not the exclusionary rule is constitutionally mandated, or whether it is merely judicially implied. Maybe I should ask you that now.

Mr. NICHOLSON. I will be glad to suggest an answer for you in this sense. I think you can find Professor Greenhalgh and a number of other professors line up and tell you you lack the authority to do anything about this because it is constitutionally mandated. You are going to get a very distinguished and respectable group of professors and others on the other side telling the opposite.

My suggestion is this: Pragmatically, we have to do something. The Court itself is unclear as to what the status is, and the Congress ought to enact something so that we can find out which side of these two imminent authorities that are going to be in contention here are correct, because certainly neither of them is going to be definitive in terms of persuading you of what is correct, I am sure.

Perhaps Mr. Carrington has something to add or detract from that.

Mr. CARRINGTON. I agree, in essence, Mr. Chairman. I think under the principles of *Marbury v. Madison*, and the questions of judicial review, as long as the Supreme Court has ruled, even in a 4-to-5 decision such as *Mapp*, that the exclusionary rule is imposed by the 14th amendment on the states. I think semantically you can say it is constitutionally mandated because the ruling of the Supreme Court is the law of the land.

However, I don't think that it means for a moment that there can't be efforts made to conform or modify by the Congress of the United States. In other words, constitutionally mandated, yes, in the sense that it is a Supreme Court decision and has not been specifically overruled. Constitutionally mandated is cast in iron, and nobody can touch it, and Congress can't enact it in legislation; I don't think that is a valid argument.

I think this is precisely what the task force recommended, and what the Justice Department is seeking to give them a vehicle to test whether the rule should be modified. So it is not constitutionally mandated in the sense that it is absolute.

Senator MATHIAS. I don't want to intrude on Mr. Nicholson's time, but you raise here the troublesome question that faces Members of Congress when the roll is called down yonder, "Should we attempt to make some judgment as to the constitutionality of the issue before us?" Or, should we just say:

Well, this is something we don't have to worry about. The courts are going to decide that sooner or later anyway, so we will exclude constitutionality from our consideration, and decide it on other grounds.

Mr. CARRINGTON. I think you would be abrogating your responsibilities if you did the latter.

Senator MATHIAS. That is my view, and I think that is the view that has been expressed by the Chief Justice, incidentally. But it sometimes is what happens around here.

Mr. CARRINGTON. Harking back to title II of the 1968 act, that passed 98 to 1, with only Senator Metcalf dissenting. The Congress had no compunction whatsoever about passing a law that, in effect, flew in the face of the absolute interpretation of the *Miranda* decision. So there is precedent for it.

Senator MATHIAS. There is good precedent and bad precedent, and that question may not have been considered by Members who voted.

Mr. CARRINGTON. I do feel, though, that 98 to 1 is fairly good precedent for a vote in the U.S. Senate. That was the vote.

Senator MATHIAS. The vote was 98 to 1 with 100 Members voting.

Mr. CARRINGTON. No; there were not 100 Members voting because that came right after Senator Kennedy was shot. But it was something like 97 or 98 to 1. The only Member of the Senate who voted against it was Senator Metcalf.

Senator MATHIAS. That was in 1967?

Mr. CARRINGTON. It was in 1968. I admit that not all Members were there because it was right after Senator Kennedy had been shot.

Senator MATHIAS. If it had been in 1969, there would have been two Members voting against it.

We are on Mr. Nicholson's time.

Mr. NICHOLSON. That is quite all right, Senator.

The final point I would like to make is that when Professor Greenhalgh was up here speaking, he emphasized the objectivity of the test dealing with reasonableness of searches and seizures. I would suggest to you that you have got to look beyond that particular phraseology he uses in this sense.

Is it really reasonable, from the point of view of the public, or from the point of view of the administration of justice, to have a black or white rule which involves an all or nothing test, no matter how trivial a particular alleged violation may be, which may even involve the absence of the rule at the time the peace officer behaves. How can that be described as reasonable by anyone's rational interpretation, either lay or legal, looking at the particular procedure involved.

The point being, reasonableness is something that should overview everything, should be the controlling function of everything we do in the administration of justice. If it isn't reasonable, then we ought not to be doing it, if it is not based on commonsense and experience. This is because, as Oliver Wendell Holmes said, "The life of the law is experience and not logic."

The point being here, if it is not reasonable, if it isn't working, and if the public has the perception that it isn't working, then we ought to do something about it. Any rule that requires a judge to decide, no matter how insignificant a peace officer's misbehavior or inadvertence may be, that all of the derivative evidence has to go out is patently unreasonable. And, I submit, the overwhelming majority of the public would agree.

I would not suggesting passing laws based upon public hysteria, but I am suggesting that the public has to believe in the system of the administration of justice, or that system will not long endure.

Senator MATHIAS. Let me ask you, because of the positions that you have held and now hold, how you feel about some of the comments that the attorney general of Maryland made when he was here with us.

He recounted that *Mapp* has been responsible for an explosion in the amount and the quality of police training in the last 20 years. He quoted a former executive director of the Maryland Police Training Commission, who attributed increase in quality and quantity of training and education directly to the need to readjust to the exclusionary rule. In other words, he felt that this was a beneficial and positive byproduct of the exclusionary rule.

Then it has had very positive effects. The specifics he gave us were that longer training periods for new officers were required, especially courses in constitutional law. The fact that many jurisdictions have more than doubled the training time, and now provide over 20 weeks of initial instruction. The fact that inservice training, which was virtually nonexistent in the past, is now emphasized. The fact that there is a higher caliber of instruction with some courses taught by law trained college professors. The fact that training is geared to practical situations, such as the stop and frisk exercises. The fact that testing constitutional law knowledge on promotional exams is a standard practice today.

I am wondering how, in the light of your experience in California, you would judge those comments?

Mr. NICHOLSON. I don't think his comments or his conclusions are necessarily premised on *Mapp v. Ohio*, or the exclusionary rule in this sense. I am sure you will agree, Mr. Chairman, that you and the legislators in the Congress, and legislators throughout the Nation, could, if they were so inclined, require appropriate training for peace officers. That is one point. So I don't think that it is a condition precedent that the exclusionary rule be a foundation for requiring peace officers to be better educated.

The second point is, let's say, that you and I are new peace officers, and we are going to the academy tomorrow. We spend 20 weeks there, and we get Professor Greenhalgh to tell us all about search and seizure.

When we finish our course, and we are out in the field, and about 3 weeks later the Supreme Court decides another search and seizure case in which they cite subparagraph (a), paragraph 1(b) and 3(c), and 4(a), and they go on and round-about completely change what is reasonable or unreasonable about the search and seizure rules we have just be taught. That has been going on for some time in many areas.

The point being, education is only so good as what it is you are being educated about, and the stability of the search and seizure rules is such that they could go out the window the day after you graduated from the academy.

Another example, in California, we have a court decision that says that lay justices of the peace are not allowed to hear criminal cases and to rule on search and seizure, and motions to suppress

because as nonlawyers they cannot understand the exclusionary rule.

So here you have a person or persons as lay judges who are trained in hearing cases, and trained in ruling on matters of law and fact, and they are specifically prohibited, because they are lay people and not lawyers, from actually hearing these things.

If you can't have a judge hearing what a search and seizure rule is, and deciding whether a search warrant ought to issue, or whether or not motions to suppress ought to be granted or denied, how can we reasonably expect peace officers, with or without training, to be on an equal plane with such judges that are excluded from the process.

So, No. 1, I agree that we ought to have the highest caliber training. We ought to have continuing training for peace officers. We ought to have supervision of peace office administratively, and we ought to see to it that they don't behave in draconian, unfair, and harassing ways.

But to me, it is more effective to do that by having good management, through good leaders, and having some kind of civil function that separates the processes of, one, finding the truth or falsity of criminal charges; two, from the finding of the truth or falsity of whether a peace officer mishaved or not. This is because I happen to believe that it is sheer insanity to let criminals go free because, as the phrase goes, particular peace officers blundered.

How can a peace officer, who did not willfully, who did not maliciously, who did not even negligently, but who did, nevertheless, make a mistake, get a case together, go to court, have the case thrown out because of the all-or-nothing exclusionary rule and then be expected to respect the system and believe in it. Likewise, how can we expect all of the crime victims in and about that case, and their families to have any respect for the system. Finally, how can anyone who reads about it, or sees it on the TV, or hears about it on the radio, believe in a system that mandates things like that to occur.

We are trivializing justice when we perpetuate the myth of the value of the exclusionary rule. I am not talking in any way about doing away with the fourth amendment. I am simply saying, the means of enforcing it ought to be changed.

Senator MATHIAS. Mr. Carrington makes somewhat the same point, that the exclusionary rule is responsible for some of the confusion in the police practice, and in police activities.

Let me ask him this question. How will abolishing the exclusionary rule really resolve that? Won't the basic questions still persist in trying to apply the fourth amendment? The basic questions are there in the fourth amendment, and not just necessarily in the exclusionary rule.

Mr. CARRINGTON. Absolutely, neither modification nor abolition is not going to clarify the law of search and seizure. What it would clarify is not the law. What it would clarify is the remedy.

As long as you have the Supreme Court of the United States, generally, they average about 6 to 3 or 5 to 4 on all search and seizure cases, and then the filter down effect of effect as I told you before, the multiplication factor of the individual judges on State

and Federal appellate courts, State and Federal trial courts, the law of search and seizure is never going to be clarified.

We are not talking, though, about modification to a good faith exception, or abolishment as a clarification procedure, I don't think that it is possible. What we are talking about is the remedy. When you have judicially created confusion, should the policeman be punished, because I don't believe he is by the exclusionary rule, but assuming arguendo that he might be, should be punished for falling afoul of the judicially created confusion.

So we are not talking clarification in these hearings, as I see it, Mr. Chairman. We are talking whether the remedy is too drastic, and whether a compromise might be reached by modification to a good faith defense.

I might add, if I may, that I personally believe in total abolition, and this is on a legal purist theory that I think the rule is a disgrace, and should be taken out. I believe, realistically speaking, modification to a good faith defense is what can be anticipated, and is what I think the Supreme Court will go along with. So I couch my remarks again in terms of a good faith modification.

Senator MATHIAS: You would then agree with Professor Schlesinger who is for outright abolition.

Mr. CARRINGTON: I agree with him.

Senator MATHIAS: He would not go as far as you, however, in this halfway house of good faith exception.

Mr. CARRINGTON: I think it is more than a halfway house. I think if a good faith modification were engrafted by statute, and I think S. 101 approaches that, although they say it from the opposite direction, that the violation was not intentional. I would still like to have it spelled out, a good faith exception, and I think that would handle about 90 percent of what in my view are the abuses of the rule.

Senator MATHIAS: What about Steve Sachs' premium on ignorance; wouldn't the officer have an ability to—

Mr. CARRINGTON: Not as long as you have the two-pronged test, the objective standard. As long as that is built into the law, I don't think it would put a premium on ignorance because we are not, and I think this should be emphasized again, talking about a situation where a police officer can do anything he pretty well pleases in the area of arrest, search and seizure, and then waltzes up on the witnesses stand and says, "I believed in good faith," a kind of boilerplate, "I believed in good faith I had the right to search."

Senator MATHIAS: But if the officers come to the conclusion that what they do is going to be viewed in the light of their bona fides.

Mr. CARRINGTON: Yes; but it is going to be viewed objectively by the trier of law.

Senator MATHIAS: I am trying to probe now, so I understand exactly how you feel about it. Isn't that going to further confuse the whole question of the fourth amendment in the perception of law enforcement officers on whose activities the whole question of citizen privacy depends.

Mr. CARRINGTON: I think that with the caliber of people we are getting into police work today, if the training academy curriculum shifts to giving them the same teaching on constitutional law and law of arrest, search and seizure, except in a different framework,

you are going to be telling the rookies in the training class, instead of saying, "If you go out there and blow a search, no matter how trivial the violation, no matter in how much good faith, the evidence goes out. You are going to be teaching them instead, 'You have an obligation to go out there and do your best to observe the law; but, the courts now—assuming they do—have given you the latitude of good faith. It is up to you to justify this by acting in good faith, and not to take advantage of it.'"

If I might analogize, in 1968 the Supreme Court of the United States in *Terry v. Ohio*, in an 8-to-1 decision written by then Chief Justice Earl Warren, allowed the police to utilize the practice of the stop and frisk on reasonable suspicion, as opposed to probable cause.

When that decision came down, there were a lot of dark rumblings from our colleagues in the ACLU and similar organizations that this was going to create a police state. Yet, the stop and frisk has been in existence now since 1968, and I cannot think of any single major gross or egregious violation that has come to the public attention. There have been cases where the courts have ruled that "in a pat down, you feel a squashy object that could not be a weapon, and it turns out to be marijuana, that is not a valid stop and frisk."

But the floodgates were not opened when the court in *Terry v. Ohio*. The police were given the extraordinary power in this, the right to stop anybody on the reasonable suspicion that they were committing or were going to commit a crime.

As I said, the floodgates were not opened. The police used this temperately. We have had evidence of any excessive use. I think that if you go to the good faith standard, you are going to get exactly the same response from the police establishment.

Senator MATHIAS. I recall a case in which I participated, it did not involve the police but it was a tax question. The jury believed that the defendant had acted in good faith when he said that he thought the monthly payments he made on equipment should be excluded from income. So the jury acquitted him, and the trial judge afterward told me that he thought that was totally wrong. If it had been up to him, he would have said, "No good faith involved."

It just illustrates the different approaches there could be to a problem of that sort.

Mr. Nicholson, would you want to comment on that?

Mr. NICHOLSON. Mr. Chairman, I just have great difficulty understanding why we don't have a system that has some flexibility in it. We are not talking about harassment. We are not talking about improperly stopping automobiles or people.

Good faith and reasonableness, they have all gone out of the system at this point. We have an all or nothing, no matter how trivial the misconduct which may occur now, and you have to remember that what is done now may be entirely legal.

I am not talking about retroactivity or anything like that. I am just saying that you, as a peace officer, could go out and behave as you have been taught to do at the academy, and Mr. Sachs might have been your instructor, and an appellate court may later make your behavior a new impropriety, and your case may be the one

where a triple killer gets away because of that later change, or God only knows what the circumstances will be.

We are in a situation where it is so unreasonable that the public has rejected the system, I am convinced of that. Again, I am not saying that we ought to do things out of public hysteria. There is nobody beating down the doors here demanding this right now. But I really believe that the public, and I know it has in California, has rejected this idea of the all or nothing approach of the exclusionary rule.

It is not reasonable so, as I said before, leaders have to transcend the myriad of technicalities and the trivialities what actually goes on in a particular incident or case, and to look at it from the point of view of the whole.

The premium on ignorance, Mr. Sachs's structure for teaching peace officers how to behave, and how to conduct searches, and how to conduct stops, and so on and so forth, should not stop because the exclusionary rule would be abolished. We should continue to teach these people, we should continue to seek out high-quality leaders at that level, just as we do for the Senate and elsewhere.

The point being, you try to do your job from a reasonable point of view. The peace officer does, too, but if he makes a mistake, they throw out the baby with the bathwater, and his work product, no matter how valid it may have been at the moment, goes by the wayside.

So the point being, when we talk about the reasonableness, as Professor Greenhalgh would have us do it, we ought to move back a little bit and look at the entire system, and we have not been doing that.

Senator MATHIAS. I have a number of other questions.

Let me ask you, Mr. Nicholson, specifically, if you could provide us with some evidence which would support the view that you expressed in your testimony that the exclusionary rule is not an effective deterrent, and that you have come to that conclusion based on the large numbers of criminal defendants who are released as a result of the application of the rule.

If you could give us some statistical basis for that, I think it would be helpful.

Mr. NICHOLSON. If I could take one more brief moment to explain my point of view on that.

I am not talking about statistical evidence. I am talking about my experience of 15 years in the profession, 10 years of that in trial practice as a prosecutor. I know because I wrote search warrants, I went out on search warrants, and I rode with the peace officers from time to time. What I am telling you is, my experience tells me that—premised upon three things, inhibited police investigations and practices, combined with some rejection of cases by prosecutors, combined with some rejection of cases by the courts on motions to exclude—the exclusionary rule has a very significant impact in terms of deterring peace officers from responsibly doing their job, but not in terms of deterring alleged misconduct. It does make it exceedingly difficult for them to protect the public.

In terms of providing you with statistics, nobody can do that because there are no reliable, broad-based empirical data on our side

or their side. The point being that experience now tells us, as Oliver Wendell Holmes said, this system is not working, and something has to be done about it. I don't think it requires numbers, I think it requires experience to tell you that, and that is precisely what I have done here.

Senator MATHIAS. Thank you both very much for being here.

Mr. NICHOLSON. Thank you, Mr. Chairman.

Mr. CARRINGTON. Thank you, Mr. Chairman.

[The prepared statements of Messrs. Carrington and Nicholson follow:]

PREPARED STATEMENT OF FRANK CARRINGTON

Mr. Chairman: My name is Frank Carrington. I reside at 4530 Oceanfront Avenue, Virginia Beach, Virginia, 23451. I appear here today in my capacity as Executive Director of the Crime Victims Legal Advocacy Institute, Inc., 210 Laskin Road, Suite 9, F & M Bank Building, Virginia Beach, Virginia, 23451.

By way of personal background, I am an attorney (LL.B. University of Michigan, LL.M Northwestern University) and I am a member of the Bars of the Supreme Court of the United States, and the states of Virginia, Ohio, Colorado and Illinois.

I spent 10 years as a law enforcement officer, first as a U.S. Treasury Agent, then as a Legal Advisor to the Chicago and Denver Police Departments, as well as serving as a Criminal Investigator in the United States Marine Corps.

I have had the honor to serve as Chairman of President-Elect Reagan's Advisory Task Force on Victims; as Assistant Director for Policy Coordination (Criminal Justice) on the Reagan/Bush Transition Team; and, most recently as a member of the Task Force on Violent Crime of the Attorney General of the United States.

I also serve as Vice-Chairman of the Victims Committee of the American Bar Association and as a Founding Director of the National Organization for Victim Assistance.

Mr. Chairman, these hearings portend to be the most extensive ever undertaken by any deliberative body concerning the exclusionary rule. Your personal interest and the outstanding work of your staff members, Mr. Klipper and Ms. Whalen, will, in my opinion, ensure that every conceivable argument,

pro and con, legal and policy, about the rule will be thoroughly aired and the record of these hearings will be the most comprehensive ever developed on this subject, which is one of critical importance to the functioning of our criminal justice system.

Because of this fact, and in order to avoid duplication of what has been said by others, I will confine my remarks to a single area of the exclusionary rule argument which, to my knowledge, has not generally been expounded, as such: deterrence of police conduct in search and seizure cases, which is the stated principal rationale for the rule, is in many cases a logical impossibility.

Likewise, for brevity's sake, I will not analyze in any detail the provisions of S.101 or S.751 in this testimony. Suffice it to say that I wholly concur with the principle which is embodied in both bills, namely, that something should be done about the exclusionary rule, whether through modification or abolition, because:

1. it does not deter police misconduct;
2. it does nothing to protect the innocent;
3. it often frees the guilty
4. it results in the suppression of the truth;
5. it probably causes as much or more public disillusionment with the criminal justice system ^{as} ~~than~~ any other legal doctrine.

I served as a member of the Attorney General's Task Force on Violent Crime which recommended in this regard:

The fundamental and legitimate purpose of the exclusionary rule--to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial--has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation."

In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees.

I voted for, and agree with, this recommendation which is, in effect, embodied in S.101; however, I also agree with the abolishment provisions in S.751. In sum, my position, as noted earlier, is that legislative action of some kind should be taken to curb the excesses which the rule has produced.

Turning specifically to the point that I outlined above, I will attempt to discuss it as briefly as possible.

I.

DETERRENCE OF POLICE MISCONDUCT THROUGH THE APPLICATION OF THE RULE IS A LOGICAL IMPOSSIBILITY IN MOST CASES

Most scholars concede that the principal rationale enunciated by the Supreme Court of the United States, when it imposed the rule first on federal officers in Weeks v. United States, 232 U.S. 383 (1914) and then on state and local officers in Mapp v. Ohio, 367 U.S. 643 (1961), was that suppression of evidence "illegally" seized would deter future illicit police conduct in cases of arrest, search and seizure.

This rationale, however, depends entirely upon the logical principle that for a given individual to be deterred from doing something, he must know, at least within reasonable limits, just what it is that he is supposed to be deterred from doing.

This is, to me, the very "lynch-pin" of the deterrence argument concerning the rule. The question is not whether suppression of evidence deters unlawful police conduct; but, rather, given the complex, conflicting, convoluted and confusing state of the law of arrest, search and seizure today, if the threat of suppression can deter such conduct at all.

To "deter" means to discourage or restrain someone from acting or proceeding for fear of the consequences of doing so; however, built into this definition must be the concept that the actor must have some certainty, within reasonable limits, as to what conduct is prohibited and what conduct is permitted. Otherwise the idea of deterrence must fail because the actor simply cannot fear the consequences of doing an act unless he knows, or should know, or believes that act to be wrong.

Applying this principle to modern day police work, the officer, to be deterred, must know or believe with some reasonable certainty that his action in making a given arrest, search and seizure is "illegal" under the law. Mr. Chairman, I submit that the law of arrest, search and seizure is so complex today that officers, who are not lawyers, engaged in the volatile business of enforcing the criminal law, have no reasonable certainty whatever as to the legal parameters which circumscribe their conduct.

In order to prove the contention that the law in this area has become such a morass that no one seems to understand it, or at least to agree about it, we need only to look to the Supreme Court of the United States itself. The Constitutional function of the Court is to interpret the law, to tell us what the law is; yet these distinguished jurists can rarely agree among themselves on search and seizure questions.

To illustrate, consider the syllabi, that is the official listing of how each Justice voted, in two relatively recent search and seizure cases from the Court.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court reversed a murder conviction based on grounds of illegal search and seizure. The syllabus reads:

Mr. Justice Harlan concurred in parts of the opinion and in the judgment and filed an opinion. Mr. Justice Black concurred in part and dissented in part in which Mr. Justice Blackmun joined in Parts II and III and in portion of Part I. Mr. Justice White concurred in part and dissented in part in which Mr. Chief Justice Burger joined. Mr. Chief Justice Burger dissented in part and concurred in part and filed opinion. 403 U.S. 433 (1971).

More recently, in United States v. Mendenhall 446 U.S. 554 (1980) the Court affirmed the conviction of a drug suspect. The syllabus reads:

STEWART, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II-B, II-C, and III, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C.J., and BLACKMUN, J., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined.

Mr. Chairman, I respectfully submit that when the Supreme Court, whose function is, or should be, to interpret and clarify the law, is so diverse in its Justices' opinions about search and seizure that we have not only 5-to-4 or 6-to-3 splits among them as to the actual holding in a given case, but even further differences over parts and sub-parts of a given opinion, then the idea of clarity of the law of search and seizure becomes literally meaningless.

This complete lack of clarity and unanimity is further, and most recently, illustrated by a report appearing in the Criminal Law Reporter of October 21, 1981 (p.2065) on the Third Annual Supreme Court Review and Constitutional Law Symposium, held in Washington, D.C. in September of 1981. The Symposium

was sponsored by the prestigious National Practice Institute, Bureau of National Affairs Education Systems and U.S. Law Week. The commentator was University of Michigan Law Professor, Yale Kamisar, who probably knows more about the law of search and seizure than anyone else in this country.

Excerpts from this report indicate very clearly the confused and convoluted state of matters at the highest tribunal in the land:

Although the U.S. Supreme Court's work during the 1980-1981 Term did little to advance constitutional doctrine, its decisions will keep law professors busy for years.

SEARCH AND SEIZURE

The Court's work in the area of criminal procedure produced two automobile search cases that have proved exceedingly difficult to decipher. Yale Kamisar, Henry K. Ransom Professor of Law at the University of Michigan, shed some light on the cloudy area of the law expounded in *New York v. Belton*, 29 CrL 3124, and *Robbins v. California*, 29 CrL 3115 (1981).

* * *

The Court in *Belton* thus formulated a "bright line" rule for search-incident automobile cases, but as Kamisar pointed out, many questions are left unanswered.

* * *

The *Robbins* court was so fragmented, Kamisar said, that Justice O'Connor "is likely to make her presence felt very quickly." This is so because there are three votes (Justices Blackmun, Rehnquist, and Stevens), and probably four including the Chief Justice, for overruling *Sanders* or drastically limiting it to its facts and for applying the Carroll Doctrine to containers found in vehicles. Even the author of the *Sanders* opinion, Justice Powell, "seems to be leaning in this direction."

* * *

[Kamisar's prediction on the future of *Robbins* may prove remarkably accurate, since the Court has opened the door to reconsideration of that decision. See 30 CrL 1605, 4035. ed].

* * *

Thus, it appears obvious that there is certainly no unanimity in the Supreme Court as to what does or does not

constitute proper police conduct. To this we must add the enormously complicating factor that although, on basic Constitutional issues, the Supreme Court makes the initial and controlling interpretation (no matter how convoluted), this interpretation is then subject to the subsidiary interpretation of the hundreds of appellate courts and thousands of trial courts across the country. The combinations and permutations of this interpretation upon interpretation upon interpretation are literally staggering.

All of these complex, conflicting and confusing interpretations are expected to be digested and rigidly adhered to by the officer on the street, upon pain of suppression if he fails to do so. And, in addition, these interpretations are made in the relatively quiet and contemplative atmosphere of trial and appellate courtrooms by law-trained judges. The policeman, usually a high-school or at most a college graduate, is supposed to make his interpretation on the street, often in a matter of minutes or even seconds and often under the acknowledged dangers and stresses of police work, and with the knowledge that the community he serves expects him to act to protect it.

Mr. Chairman, this is where the logical impossibility of any deterrence of the suppression doctrine comes in. The officer is supposed to be "discouraged or restrained" from doing "illegal" acts in the performance of his duty, but, given the complexities outlined above, he cannot, realistically speaking, know what he is or is not supposed to do in most cases; hence, the entire concept of deterrence must fail.

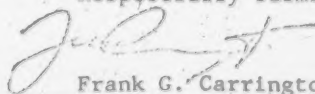
Even the Supreme Court of the United States has recognized this:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. United States v. Peltier, 422 U.S. 531, at 542.

Only very recently have a few courts begun to engraft their own "good faith" exceptions onto the exclusionary rule, U.S. v. Williams, 622 F.2d 830 (5th Cir. En Banc, 1980); People v. Adams, 442 N.E.2d 537 (N.Y.Ct. App., 1981); Richmond v. Commonwealth, 29 CrL 2529 (Ky.Ct. App., 1981). In each of these cases the officers had made arrests or searches under circumstances which, strictly speaking, violated the defendants' Fourth Amendment rights but which were made in good faith by any objective standard. In each case the court refused to suppress the evidence on the theory that since the police reasonably, albeit erroneously, believed that they had probable cause to act as they did, it would serve no deterrent purpose to exclude the evidence.

Mr. Chairman, I submit that the rationale of these decisions underscores the "logical impossibility of deterrence" argument made above. Each search was made under circumstances in which the complexity of the law was such that the officers had reason to believe that they were acting properly even though, in hindsight, it was found that they were not. The important point is that the courts found that they were not deterred because they believed, in good faith, that their actions were correct and hence there should be no suppression. Thus it would appear that the complexity of the law argument and the good faith exception are "opposite sides of the same coin," and I hope that one would reinforce the other in this Committee's deliberations as to whether to modify or abolish the exclusionary rule.

Respectfully submitted,



Frank G. Carrington

PREPARED STATEMENT OF GEORGE NICHOLSON

INTRODUCTION

Mr. Chairman, my name is George Nicholson. I am Senior Assistant Attorney General, Department of Justice, State of California, but I want to make it clear I am appearing here in my private capacity as Legal Consultant for, and on behalf of, Laws at Work, a non-profit volunteer citizens' public service organization headquartered in Los Angeles, California. This is a written statement expressing Laws at Work's position. For purposes of brevity and to help the committee make the best use of its limited time, may I respectfully request the statement be entered into the record in its entirety? After more completely identifying myself and Laws at Work, I will outline that statement and thereafter answer any questions you or the other committee members may have.

Mr. Chairman, prior to joining the Department of Justice, State of California, I spent three years as Executive Director of the California District Attorneys Association. While there, I represented all 58 of the state's elected district attorneys and most of their roughly 2,000 prosecutors in a variety of ways, including that of directing their legislative affairs. Before joining the California District Attorneys Association, I spent almost 10 years with the Alameda County District Attorney's Office, headquartered in Oakland, California. During the last several of those years, I was Senior Trial Deputy District Attorney and specialized in homicide prosecutions, particularly those involving psychiatric and psychological evidence. I have edited a book, "Forgotten Victims: An Advocate's Anthology." For two years, I wrote a syndicated weekly politico-legal news column published in hundreds of newspapers throughout California. I have published extensively in lay magazines and legal journals. I am a member of President Ronald Reagan's Victims of Crime Advisory Committee, the American Bar Association's National Victims of Crime Committee and Legal Consult to the National Education Institute.

Laws at Work is, as noted, a non-profit, volunteer citizens' public service organization headquartered in Los Angeles, California. This year it celebrated its fifteenth anniversary of commitment to, and scholarly research toward, improving the administration of justice and making America a safer place to live for everyone.

On the occasion of its 15th anniversary celebration this past October, Laws at Work received a letter from President Ronald Reagan. That letter, with italic added, reads as follows:

SEPTEMBER 29, 1981.

To the Members and Friends of Laws at Work:

What a delight it is to congratulate you on fifteen years of citizen assistance to law enforcement. Hopefully, we will see passed in this session of Congress several measures you have advocated for a long time. *First on that list is a change in the exclusionary rule which is, as you know, a judge-made rule which has failed to accomplish its avowed purpose and only aids the obviously guilty criminal at the expense of the law abiding public.*

You have been an encouragement to me in this fight against crime. The criminal justice system has not been effective; while some within the system have become wearied by the seeming lack of progress, you have insisted on change and have persisted in your efforts for a better community.

Thanks for helping and please keep on focusing our attention on the desirability of a criminal justice system that works.

Sincerely,

/s/ RONALD REAGAN.

One of the reasons President Reagan respects Laws at Work so much is found in the distinguished array of civic leaders who conduct its affairs. They include: Founders—Doris Dolan, Albert J. Eyraud Jr., and Dr. C. Erwin Piper; Officers—Alfred Bloomingdale, Chairman of the Board; William Craig Stubblebine, Vice Chairman; Doris Dolan, President; Lloyd F. Dunn, Esq., Vice President, Policy; Richard M. Pittenger, Vice President, Public Relations; I. Warren Rainer, Esq., Vice President, Endowment Program; Mrs. Judson S. Swearingen, Vice President, Special Events; Robert L. Toms, Esq., Vice President, Corporate Affairs; G. Joseph Bertain, Jr. Esq., Vice President, Foundation Grants; Patricia J. Busk, Recording Secretary; Mrs. Robert Fenton Craig, Corresponding Secretary; and Walter H. Lohman, CPA, Treasurer; Honorary Life Members—Edwin Meese III and Herbert E. Ellingwood; Board of Advisors—Marvin B. Byron, Dorothy D. Corey, Robert R. Dockson, Shirley Reid Frahm, Clifford Holliday, Robert E. Petersen, The Hon. Evette F. Younger, Thomas Reddin, Robert L. Rock, Mrs. Norman Taurog, Mrs. Estelle Van Meter,

Frank J. Vodhanel, Harold S. Voegelin, and Willard S. Voit; California Advisory Panel—Chief Raymond C. Davis, Chairman, Governor's Crime Resistance Task Force; The Hon. George Deukmejian, Attorney General of California; William D. Curtis, president, California District Attorneys Association; Chief Robert Wasserman, President, California Peace Officers Association; Bob Wiley, President, California Sheriffs Association; Honorary National Advisory Council—John Jay Douglass, Dean, National College of District Attorneys, Houston, Texas; Donald E. Santarelli, Attorney at Law, Washington, D.C.; The Hon. David L. Armstrong, President, National District Attorney's Association; Frank Carrington, Attorney & Counselor at Law, Virginia Beach, Virginia; and William F. Quinn, President, International Association, Chiefs of Police.

One of Laws at Work's most notable and sustained programs has been a series of four Conferences on the Judiciary which have been conducted through the years to analyze and propose new ways and means to help the judiciary to improve public safety and provide a fairer, more effective administration of justice in America. The research, models, and concepts contained in the published reports of those conferences have also served as valuable tools for several other states' agencies, judicial councils and legislatures, and many national organizations. One of the most notable recommendations to flow from the conferences has been the one to substantially narrow, if not abolish the exclusionary rule.

The provisions of S. 101 or S. 751, for brevity, are not detailed in this statement. Suffice it to say that Laws at Work wholly concurs with the principles embodied in both bills, namely, that something should be done about the exclusionary rule whether through its modification or abolition. This is because, as Frank Carrington, Executive Director of the Crime Victims Legal Advocacy Institute in Virginia, declares: (1) It does not deter police misconduct; (2) It does nothing to protect the innocent; (3) It often frees the guilty; (4) It results in the suppression of the truth; and (5) It probably causes as much or more public disillusionment with the criminal justice system than any other legal doctrine.

S. 101 contains a proposal which in effect, is essentially the same as that contained in the formal report of Attorney General William French Smith's Task Force on Violent Crime. While S. 751 would abolish the exclusionary rule. Laws at Work's position, as to both bills, is that legislative action of some kind should be taken to curb the excesses which the rule has produced.

At your formal request, I am honored to be here representing Laws at Work, Mr. Chairman.

STATEMENT

Mr. CHAIRMAN: From Barrow in the Arctic to Key West in the Gulf, from Niihua in the Pacific to Lubec in the Atlantic, an iron curtain has descended across the face of justice in America.

When Winston Churchill first used a very similar phrase in 1946, he was, of course, addressing another evil and epoch. But the startling aptness and chilling relevance of this great statesman's eloquence merit this contemporary echo of his potent, post-war phraseology because it most vividly and accurately portrays the ominous, oppressive impact of the judge-made exclusionary rule.

First created by the United States Supreme Court in 1914 in *Weeks v. United States*, the exclusionary rule was then narrowly applied to federal law enforcement officers. Fairly constant pressure to judicially append this legal encumbrance onto state law enforcement officers was continued for several decades by academia, civil liberties activists and the criminal defense bar, until 1961, when the federal high court reluctantly did as they asked in *Mapp v. Ohio*.

"And so," declares B. E. Witkin,¹ one of America's foremost legal scholars, "we became the unhappy recipients of the bloated and amorphous law of illegally ob-

¹ Former California Court of Appeal Justice Robert Thompson had this to say about this 77-year-old patriarch of California legal scholarship: "Witkin's qualifications dictate serious consideration of his observations. No other person possesses his combination of legal scholarship, dedication to the judicial process, knowledge of the nuts and bolts of the system experience in day to day observation of how the judiciary operates, and common sense approach of combining all of them in planning for improvement. Witkin's 'Summary of California Law' and 'Summary of California Procedure' are considered the most authoritative texts used by California lawyers and California courts. His 'Manual of Appellate Court Opinions' has the same acceptance. The 'California Rules of Court' governing appeals are also Witkin's creation. For as long as I have been on the bench, and I am sure for much longer, he has served as an unpaid advisory member of the California Judicial Council. Witkin's personally endowed foundation has contributed mightily to California's pioneering system of continuing education of judges."

tained evidence, now an integral part of almost every major criminal trial, in which the issue of the guilt of the defendant is often subordinated to an examination of the *endless technicalities* involved in the issue of how the evidence of his guilt was obtained." (Italics added.)

Thus, when a peace officer commits an act or omission which a trial judge or appellate tribunal later categorizes as a violation of the constitutional prohibition against unreasonable searches and seizures, no matter how trivial or technical the violation and regardless of whether it was willful or merely inadvertent, any and all evidence seized thereby is officially placed behind the judicially-constructed iron curtain and secreted from the trier of fact, whether a trial judge or jury.

This "all or nothing" approach was recognized and criticized in the formal report of Attorney General William French Smith's Task Force on Violent Crime which was issued August 17 when it urged a major change in the exclusionary rule.

As a consequence of *Weeks* and *Mapp*, every federal and state judge in this nation must sacrifice the search for truth, and the quest to determine criminal guilt or innocence, upon the judicially-created iron altar of the exclusionary rule, following now deeply-ingrained, time-consuming and costly tribal rites called motions to suppress.

The exclusionary rule's iron curtain is no where mandated in the Constitution of the United States. Nor is it systematically used anywhere else in the world. And, despite the eager and deceptive protestations of the exclusionary rule's proponents, the Fourth Amendment's prohibition against unreasonable searches and seizures is a totally separate consideration, one we all support. But that I mean, the exclusionary rule's iron curtain could be lifted this very minute by its abolition and the Fourth Amendment would remain inviolate. Such an abolition, I should hasten to add, paraphrasing Benjamin Cardozo, would be no seismic innovation. The edifice of justice would stand, its symmetry, to most, greater than before.

Since the beginnings of efforts to modify the exclusionary rule, if not outright abolish it, are why we are here today, it may help to discuss some of the purposes which are ascribed to the exclusionary rule by its proponents. One of those purposes is, proponents say, removal of the courts from the "dirty business" of admitting illegally obtained evidence. Without the exclusionary rule, proponents assert, courts would be required to admit illegally obtained evidence at trials and to implicitly approve lawbreaking enforcement officers.

This assertion ignores the real purpose of criminal trials, which is the ascertainment of truth. The suppression of relevant and reliable evidence impedes that purpose. This is not to say that actual peace officer misconduct should be condoned. It is merely to acknowledge the obvious. A trier of fact, whether a trial judge or a jury, must be allowed to consider all relevant and reliable evidence if a just verdict is to result.

The major problem with the arbitrary and capricious exclusionary rule is that while it may remove courts from the implicitly "dirty business" of admitting illegally obtained evidence, it squarely projects judges actively into the explicitly ignoble business of erecting an iron curtain across the face of justice in every courtroom in this nation. This is the result because, as Chief Justice Warren Burger declares, the exclusionary rule is a "Draconian, discredited, absolutist device" which hides the truth through willful and deliberate concealment of relevant and reliable evidence.

It should be noted at this point, critics often declare the exclusionary rule may free some criminals but it nevertheless protect the innocent. This is a benefit which is most difficult to perceive. Innocent people against whom allegedly improper police conduct occurs, are not faced with the recovery of incriminating evidence, they don't wind up in criminal court and, consequently, they can't make motions to suppress the evidence against them since none was recovered. Thus, only criminals against whom incriminating evidence was actually found can make such motions and receive the judicial largesse of the exclusionary rule.

In other words, the exclusionary rule's iron curtain shields criminals, not innocent citizens, at the same time as it puts judges into the "dirty business" of frustrating the search for truth.

While the exclusionary rule has proven very effective as an iron curtain which shields criminals and conceals relevant and reliable evidence, it has not proven itself equally effective as a deterrent of illegal peace officer activity. Such deterrence is another of the exclusionary rule's purposes according to its proponents.²

² The United States Supreme Court says this about deterrence, "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." *Stone v. Powell*, (1976) 428 U.S. 465, 486.

The exclusionary rule's ineffectiveness as a deterrent can be traced to two principle considerations: (1) the rule punishes the wrong people, the public; and (2) the constitutional law of search and seizure, as constantly accreted and enforced by judicial decree, has become too voluminous, complex and transitory for laymen to grasp.

When relevant and reliable evidence in a murder case is judicially secreted behind an iron curtain and kept from a trier of fact, whether a trial judge or jury, by the exclusionary rule and a killer is thereby set free, it is the public, not the peace officer, which pays the penalty. Moreover, months, even years, may separate police conduct from actual judicial suppression of evidence, making any deterrent effect speculative at best.

No rule can be a good deterrent if it cannot be understood. In one California case decided by an appellate tribunal in the mid-70s, the court declared that a justice of the peace who was not a lawyer could not issue a search warrant because search and seizure law was too complex for lay judges to understand.

This remarkably candid decision appears to be an understatement. Even judges who are lawyers frequently disagree about what search and seizure rules mean and when, where and how to apply them.

Search and seizure comprise an unpredictable, extremely complex, confused, contradictory and chaotic field of the law. How can such vague and constantly shifting rules, or as Witkin calls them, "bloated and amorphous" concepts, act as an effective deterrent to anyone or anything, except the search for truth?

This is especially true of cases in which appellate courts change the rules of search and seizure in midstream. In such cases, peace officers may conduct a search and seizure in complete conformity to the letter of the law as it exists at the time they act, only to discover that an appellate court, in reviewing the events months or years later, changes a rule, applies that changed rule back, and suppresses the evidence.

How can peace officers act in conformity with court decisions then yet unrendered? While the United States Supreme Court says it doesn't apply search and seizure rules retroactively, such matters are less clear elsewhere. Also, despite the fact the following statements by Presiding Justice Robert K. Puglia of California Third District Court of Appeals do not refer to search and seizure rules, the thinking which prompted them does.

"Criminal court rules," charges Presiding Justice Puglia, "are being changed for the benefit of defendants and to the detriment of the people after the game has been played."

"The inevitable consequence," warns the Sacramento jurist, "is the ex post facto creation of error where none otherwise would exist, and the unfortunate reversal of many convictions that would otherwise have been affirmed."

Such decisions, Puglia declares, "assuredly exact a considerable cost in loss of public confidence in the judicial system, not to mention the very tangible economic drain on public funds resulting from the retrial of these cases. Public confidence is even further eroded when intervening events render retrial impossible or futile."

"The tarnished image of the judiciary today," laments Puglia, "is, in significant part, attributable to the socially destabilizing effect of wholesale reversals of criminal convictions for failure to comply with rules that did not even exist at the time of trial. Certainly the maintenance of public acceptance of a system largely responsible for the protection of individual rights is no less important than the rights themselves."

Putting Justice Puglia's words another way, Leon Jaworski declares, "Let our courts be ever fair, but let them never fail to be effective. Fairness without effectiveness will bring woes to our criminal justice system and ills to our society."

"Surely," Justice Puglia concludes, "it must be possible to effect orderly change in judicial procedures (and, for that matter, in the law of search and seizure following the limitation or abolition of the exclusionary rule) without the attendant carnage that retroactivity (the exclusionary rule) has wrecked over the past two decades, a period in which the judicial landscape, resembling nothing so much as a giant junkyard, has been cluttered with wreckage of convictions fairly won but sacrificed to the fetish of our highest courts for after-acquired wisdom." (Italics added.)

The time has come to stop punishing the public because of alleged peace officer violations of search and seizure rules that are too numerous, complex and transitory for even their judicial progenitors to understand.

One noted academician says critics of the exclusionary rule are wrong; that judicial adoption of this rule really didn't change what peace officers had to do to comply with the Fourth Amendment and that it, the exclusionary rule, is really the only way to enforce the Fourth Amendment's mandates.

That academician declares that what was unlawful before *Mapp* was still unlawful after *Mapp*. He also infers that what was lawful before *Mapp* was, and is, still lawful after. What were lawful searches and seizures before *Mapp* are no longer lawful now. In other words, not only did *Mapp* deliver the total suppression of relevant and reliable evidence as progeny, it promoted the subsequent delivery of other, unnumbered judicial offspring which have, by accretion, inflated Witkin's "bloated and amorphous" search and seizure law. That "bloated and amorphous" law, is now being interminably litigated daily all over America in the context of *Mapp*'s exclusionary rule construct which, as already noted, the Chief Justice describes as a "Draconian, discredited, absolutist device."

Maybe, just maybe, Alexander Solzhenitsen was right when he said, "Life organized legalistically has shown its inability to defend itself against the corrosion of evil." Certainly, the exclusionary rule's iron curtain and the exceedingly dense minefield of search and seizure technicalities which cloister it, limit America's capacity to defend itself against the corrosive evil of crime.

To really get serious about the "lawless enforcement of the law," passage of either S. 101 or S. 751 might be followed by efforts to create the federal administrative controls and civil compensation structures necessary to deal with alleged peace officer violations of constitutional rules in a way which could very well permit a simultaneous reconsideration and reconstruction of federal rules governing search and seizure into certain, predictable and understandable terms based on common sense and reason.

Then the derivative process of lifting the iron curtain which *Mapp* has brought down across the face of justice in America's state courts might then also begin in earnest. This might then permit state courts to rationally and fairly experiment with "what works."

Judge Malcolm Wilkey put it this way, "Let us calmly and carefully consider the available alternatives, draw upon the experience of other nations with systems of justice similar to our own, and by abolishing the exclusionary rule, permit the laboratories of our 51 jurisdictions to experiment with the various possible alternatives promising far more than the now discredited exclusionary rule."

Is this so daring. No, not really. It is nothing more than a recognition of the "grave responsibility" of which Louis Brandeis, in another context, spoke in 1931.

"To stay experimentation," Justice Brandeis declared, "in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences for the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This court has the power to prevent an experiment . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, let our minds be bold."

Carrying the concept boldness one step further, Theodore Roosevelt put it this way, "Far better it is to dare mighty things, to win glorious triumphs, *even though checkered by failure*, than to take rank with those poor spirits who neither enjoy much nor suffer much, for they dwell in the gray twilight which knows neither victory or defeat." (Italics added.)

Experimentation in the effort to modify or replace the exclusionary rule, may succeed or fail in a given instance, but to be effective it must be premised upon the empirical method. The empirical method is based on the development of factual information without artificial restraints, on observations and direct sense experiences, rather than on speculation or dialectic. By setting a federally imposed, search and seizure exclusionary rule bottom line for the states, the *Mapp* decision as wrecked individual state experimentation and their clinical search for "what works." It requires state courts to either adhere to that federal bottom line or else move ever more solicitously toward enhanced rights for criminal defendants. There is no flexibility under the *Mapp* ruling for the states to move less solicitously toward the rights of criminal defendants. Because civil liberties activists and the criminal defense bar continue the drum beat of new and ever-novel motions to suppress, and because there is only one direction to go, and that is in favor of criminal defendants, law enforcement is weakened daily.

California serves as a good example of the Alice in Wonderland aura which pervades such a distorted scenario.

In 1969, the California Supreme Court declared a section of the State's "Evidence Code" unconstitutional in *People v. Green*. In doing so, it relied on federal constitutional grounds. Not surprisingly, the people appealed to the United States Supreme Court and obtained a reversal in *California v. Green* a year later. A second Califor-

nia Supreme Court decision in *People v. Green* was rendered in 1971 and it followed the federal mandate. A majority of the California Supreme Court and others didn't like being "second guessed" by the federal high court and they set about to "short circuit" the relationship.

Later in 1971, the California Supreme Court decided *People v. Krivda* and suppressed evidence derived from the search of a garbage can largely because "half truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." Once again, the state high court seemed to rely on federal constitutional grounds. The people appealed to the United States Supreme Court. This time, the federal high court sent the case back to California because it was not clear whether the state decision was based on "an adequate and independent nonfederal ground."

The California Supreme Court "located" an "adequate and independent nonfederal ground" and, as a consequence, the wierd and wonderful spectacle of "independent state grounds" was delivered to the world. The self-proclaimed source was a young Santa Clara County assistant public defender, Rose Bird. Bird, who now reigns as California's chief justice, made her "independent state grounds" role clear during the pendency of her nomination to the state high court in February, 1977. She then told an Associated Press reporter, "Did you know I developed that concept (independent state grounds) in the *Krivda* brief before the United States Supreme Court?" She added, "The concept of independent state grounds is really a conservative judicial concept because it allows the states the freedom to make determinations based on their own constitutions."

What she failed to note is the fact that United States Supreme Court decisions give criminal defendants greater rights, its decisions control. If the California Supreme Court gives criminal defendants greater rights, its decisions control. In either event, under the doctrine of "independent state grounds," criminal defendants win and the public loses.

In the California Supreme Court's second *Krivda* decision, rendered in 1973, the former decision was "clarified" and the U.S. Supreme Court was clearly told the decision was based on an "independent nonfederal ground." "Independent state grounds" has come to be the center of a heated public controversy ever since.

In fact, the California Supreme Court has been accused by one of its own members, Justice Frank K. Richardson, of marching in one direction "when it is very apparent that the parade is marching in the other direction," of amending statutes without constitutional sanction, "of charting a course which leads deeply into a 'never-never-land' of purest speculation" and of being "wholly unrealistic" and assuming a posture of "wooden rigidity." Another member of the same court, former Justice William P. Clark, has declared: "Our deference to the United States Supreme Court is fast becoming a shell game."

By expanding the new "independent state grounds" phenomenon, the California Supreme Court seems to have actively adopted Justice Mathew Tobriner's advice, which was contained in his article, "Can Young Lawyers Reform Society Through Courts?" which was published in the California State Bar Journal in 1972. Justice Tobriner there boldly declared that appellate courts should reform society. Judge Robert Kroninger of the Alameda County Superior Court prepared a carefully reasoned reply to Justice Tobriner's article which appeared in his article, "Should Old Judges Reform Society Through The Courts?" which was published in a later issue of the Journal. "The umpire does not take up a bat when he is dissatisfied with the game and wants a more active role, and judges who covet the role of the shaper-of-society should doff the robe and test their programs in the arena of partisan politics," replied Judge Kroninger.

Justice Stanley Mosk, in a speech delivered to a California State Bar gathering held in San Diego, in 1977, was more colorful in his defense of "independent state grounds" than he usually is in his written court opinions. He laid the blame at the door of Alice in Wonderland's White Rabbit when he explained how the California Supreme Court could rule opposite from the United States Supreme Court when the state and federal constitutions are worded virtually identically. "If he writes the same thing, why does he do it twice?" Justice Mosk quoted Alice. "Because," Justice Mosk quoted White Rabbit, "he may write the same thing, but it reads differently." And, Justice Mosk concluded, the California Supreme Court, like White Rabbit, can read the same thing differently if it wants to.

This prompted California Assemblyman Alister McAlister to declare, "In criminal cases, the independent state grounds doctrine of Rose Bird and Stanley Mosk means 'heads the defendant wins and tails the people lose.' This is because the criminal defendant is always given the benefit of whichever court, whether it is the United States Supreme Court or the California Supreme Court, renders the decision which

grants the greater rights. Strangely enough, the independent state grounds doctrine never works in favor of the people and their rights to protection from criminals."

The tyranny of the exclusionary rule, as Professor Steven R. Schlesinger has decried it, is infectious. In California, it has, for example, when combined with "independent state grounds," led to extremes. One such extreme is found in *People v. Zelinski* (1979) 24 Cal.3d 357. In *Zelinski*, the California Supreme Court extended the exclusionary rule and search and seizure rules in all their technical splendor to private security guards. Wherein lie the private security guards' state action. Three other similar extremes, for illustration, include *Kaplan v. Supreme Court* (1971) 6 Cal.3d 150 (vicarious exclusionary rule); *People v. Brisendine* (1971) 13 Cal.3d 528 (knap sack); *People v. Cook* (1978) 22 Cal.3d 67 (search warrants; reckless falsehoods); and *People v. Minjares* (1978) 24 Cal.3d 410 (tote bag).

Another judicial excess, a particularly outrageous one, is found in the 1980 California Supreme Court decision, *People v. Zamora*, 28 Cal.3d 88. Although it is not an exclusionary rule/search and seizure case, it nevertheless is an outgrowth of the exclusionary rule/search and seizure syndrome.

Through no fault of the relevant peace officers, the Los Angeles City Attorney and City Council approved the destruction of old (none were less than five years old), unproven citizen complaints against members of the Los Angeles Police Department. Later, in a criminal case, the defendant, Joseph Anthony Zamora, moved to discover all citizen complaints, whether proven or unproven, against the arresting officers. The trial judge, after a hearing, determined the official prior destruction of the old unproven citizen complaints had not been malicious, nor done in bad faith, and denied Zamora's motion to dismiss the case.

After a jury trial, Zamora was convicted of battery on a peace officer and resisting a peace officer in the discharge of his duty. He appealed and his case eventually reached our state high court.

As bizarre as it may sound, not only did the California Supreme Court reverse Zamora's convictions, it also, in meticulous detail, ordered the trial judge, upon remand, to affirmatively deceive the jury.

The state high court did so by ordering the trial judge to falsely instruct the jury: (1) that the relevant peace officers previously used excessive force against suspects; (2) that the jury could rely on that to infer the relevant peace officers were prone to use excessive force; and (3) that the relevant peace officers' testimony, as a consequence, may be biased. (28 Cal.3d 88, 102-103.)

In other words, the California Supreme Court went substantially beyond merely placing evidence behind the iron curtain of the exclusionary rule. It affirmatively directed a trial judge whose oath of office included a pledge to uphold both state and federal constitutions, to disregard that oath by wilfully deceiving a jury and actively defaming the relevant peace officers who, as innocent, law-abiding, tax-paying citizens, would, thereby, if the case were retried, be held up to ridicule and scorn by both the second jury and the public. You can be sure such a remarkable event would have been widely reported in the news media, much to the embarrassment and sorrow of the relevant peace officers and their families.

The city attorney has apparently decided to dismiss the case rather than proceed under the circumstances. Thus, the criminal goes free, not because the constable blundered, but for reasons entirely beyond his control.

Through decades of courts being conditioned to deception of juries by hiding evidence (based on the tyranny of the exclusionary rule), some judicial thinking and decisionmaking has become so jaded as to render possible even an abhorrence such as the California Supreme Court's *Zamora* decision. (For other excesses, unrelated to the exclusionary rule as it relates to search and seizure, see *Reynolds v. Superior Court*; (1974) 12 Cal.3d 834; *People v. Disbrow* (1976) 16 Cal.3d 101; *People v. Collie*, (1981)—Cal.3d—.)

But those decades have wrought other havoc as well. Just imagine what it is now like to be a peace officer. Imagine the prospect of having articulate and dedicated civil liberties activists and criminal defense lawyers daily committed to proving, in virtually every criminal case, whether heard in state or federal courts, that the constable blundered.

The allegations of peace officer misconduct have become so common-place, so repetitive and so frivolous, as to often reduce them to laughable absurdities but for two things: (1) the exclusionary rule and motions to suppress provide a virtually limitless public forum for even the most absurd allegations of peace officer misconduct; and (2) the destabilizing effect the exclusionary rule and wholesale motions to suppress have on innocent citizens and innocent peace officers alike.

It is fair to declare the exclusionary rule and "bloated and amorphous" search and seizure technicalities are unreasonable and demoralizing influences on peace officers and their work.

Not only that but the exclusionary rule and "bloated and amorphous" search and seizure technicalities have significantly contributed to declining public respect for the administration of justice in America. And, as Justice Puglia declares, "Certainly the *maintenance of public acceptance* of a system largely responsible for the protection of individual rights is *no less important* than the rights themselves." (Italics added.)

To begin moderating these judicial excesses and to start the difficult process of restoring balance in California requires the favorable resolution of several problems, both at state and federal levels. It is a chicken and egg proposition, however, as to whether the *Mapp* decision must be set aside first, or whether the state exclusionary rule, created by the California Supreme Court's 1955 *People v. Cahan* decision and its 1973 independent state grounds doctrine must be set aside. These questions are compounded by the question of whether, in each instance, such changes are, as practical matters, achievable at all.

Parenthetically, the California Department of Justice is preparing the "California Peace Officers Legal Sourcebook," which will deal with all the subjects, particularly search and seizure, necessary to promote the effective and uniform application of the law throughout the state by placing one basic, reliable source in the hands of the entire law enforcement community statewide. The "Sourcebook," if adequate funding is found, will be distributed to the state's more than 45,000 peace officers and 2,000 prosecutors by mid-1982. Regular revision of the "Sourcebook," which will be a looseleaf, carefully tabulated, binder format, is planned to keep it current with the case law explosion which has continued unabated for sometime now. Initial costs of preparation, product and distribution are estimated to be about \$500,000. Annual supplemental costs may run at one third to one half of that figure. Obviously, the "Sourcebook" will be very costly, complex and continuing obligation of real significance.

With Law at Work taking no position one way or the other, it is important to note there is a major state assault on the exclusionary rule, and a serious consideration of all the foregoing questions, underway in California today.

An initiative, the Victim's Bill of Rights, has been drafted which would significantly improve the administration of justice in California, according to its proponents, in more than a dozen specific ways. Among those ways is an abolition of the California Supreme Court's *Cahan* decision, its independently constructed basis for the exclusionary rule, and the independent state grounds construct.

The pertinent clause of the Victim's Bill of Rights reads as follows: "(d) Right to Truth in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

Even if the people of California qualify the Victim's Bill of Rights and it passes by a formal vote next year, the *Mapp* decision, with its federal lid on experimentation will still remain. Thus, while *Cahan* and independent state grounds for California's more technical search and seizure rulings would be abolished, both the *Mapp* exclusionary rule applied to the states in 1961 and the federal high court's numerous complex search and seizure edicts will remain intact. (While the California Supreme Court's search and seizure rules are worse, those United States Supreme Court's search and seizure rulings are, nonetheless, "bloated and amorphous," just as Witkin declared.)

To indicate the nature and breadth of the support for Victim's Bill of Rights, its backers include Lt. Governor Mike Curb, Attorney General George Deukmejian, 50 state legislators, both Democrat and Republican, and more 200 prosecutors, police chiefs and sheriffs. The campaign to obtain the more than 500,000 signatures necessary to place the Victim's Bill of Rights on the ballot next year is a bipartisan one, and with well-more than half the necessary signatures already achieved, backers are optimistic they will get it qualified in the time that remains for them to do so.

A more modest legislative proposal to limit independent state grounds and derivatively limit California's search and seizure rules to federally imposed standards is contained in California Senate Constitutional Amendment 7. While SCA 7 has passed the State Senate, it has long been stalled in a State Assembly committee. Because of

that, and because predecessor bills have died in the same committee during each of the past five years, SCA 7's legislative prognosis is very guarded.

If the necessary steps could be taken at the federal level, to modify or abolish the *Mapp* decision, as as the *Weeks* decision, California, or any one of the other 49 states, might very well prove to be the crucible in which new ways to provide more effective and fairer search and seizure techniques might be tried, tested and proved. Time and circumstances, both state and federal, must yet shape these possibilities.

The *Weeks* and *Mapp* decisions have stifled experimentation, doused the light of reason and placed America's peace officers on one side of an iron curtain and criminals on the other, at precisely the moment in our history when we most need our peace officers at their bold and effective best. And, most significantly and symbolically, these two judicial edicts have erected that iron curtain across the face of justice in America, as well. Isn't it time for us to begin lifting that iron curtain from around America's peace officers and from within courtrooms and thereby restore America's peace officers as effective protectors of our innocent citizens and reinstitute our courtrooms as citadels of truth and trust.

It never has, and it never will make sense, common or constitutional, to permit criminals to go free because constables blunder.

Consequently, we must once again be guided by Cardoza's sage advice that, "justice though due the accused, is due the accuser also. Fairness must not be strained until it is narrowed to a filament. We are to keep the balance true."

The American people have every right to expect fairness and balance to be restored by partially or totally lifting the exclusionary rule's federal iron curtain now by passage of S. 101 or S. 751, and by actively addressing the issue of how to best lift *Mapp*'s iron curtain from our states. (The continued vitality of the exclusionary rule and the lingering presence of its iron curtain, cloistered by the tangled minefield of search and seizure technicalities, have but one empirically certain effect, the suppression of truth and the destruction of justice.) Churchill would agree, almost surely, this would be a very good thing to do.

Mr. Chairman: On behalf of Laws at Work, may I extend our deepest gratitude for your kind invitation and for the opportunity to present this statement.

Senator MATHIAS. Our final witness this morning is Prof. Leon Friedman, who represents the American Civil Liberties Union.

STATEMENT OF LEON FRIEDMAN, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY PIERRE SCHLAG, COVINGTON & BURLING

Mr. FRIEDMAN. Senator Mathias, I am accompanied by Pierre Schlag of Covington & Burling, who has prepared a memorandum of law on the constitutionality of the proposed legislation. I would like Mr. Schlag to sit up here with me and respond to some questions.

Senator MATHIAS. The committee is very happy to welcome him as well as you.

Mr. FRIEDMAN. I will very briefly summarize my statement, and I would like to respond in this ongoing debate to some of the comments made earlier.

Senator MATHIAS. Let me say in advance that your statement will be included in full in the record as if read, and then you can comment as you please.

Mr. FRIEDMAN. Our basic point is that the exclusionary rule does work, and in terms of a cost/benefit analysis. Here we have this legal rule that has been on the books for some 60 years in the Federal system, and some 20 years in the State system, what are the costs of the rule, do those costs have to be paid or is there some way of reducing those costs, and what are the benefits of the rule. I think that this is the approach that we are trying to take in approaching this problem.

As far as the cost of the exclusionary rule, the cost of the rule is that a guilty criminal will go free. A terrible criminal who has victimized someone will walk out of court scot-free because this rule is in effect. It seems to me that this is the cost of the rule, and that, I assume, is an undesirable result, and something that, as Chief Justice Burger says, a civilized society should take another look at.

It seems to me you do have to look at the numbers. There has to be some basis for making these judgments, other than an individual idea that it happens. The GAO study, the INSLAW study all indicate the very small number of times that a criminal will go free.

Senator MATHIAS. Are you suggesting that there is currently an amendment to the old maxim, "Better that the guilty should escape than that the innocent should suffer," and the current amendment would be, "unless it happens too often"?

Mr. FRIEDMAN. If it was a very large problem, we would take the position that there would still be reason for retaining it. But if it is a small problem, then it seems to me we must follow the famous Holmes dictum that "Better the guilty go free than that society should suffer these problems from a police force that would ignore the constitutional rule." That is another way of looking at it.

The GAO study says 1.3 percent successful suppression motions are made; that is to say, some evidence gets excluded. It doesn't mean that the criminal goes free, because in half of those cases he gets convicted anyhow. That is what the GAO study says. In half of the cases, where there is a successful suppression motion, the person still goes to jail.

Senator MATHIAS. So that cuts it down to 0.65.

Mr. FRIEDMAN. We are way down there, we are at 0.65. Let me tell you, in a lot of those cases, where a case gets thrown out, he gets retried on another theory, or he gets retried on another charge, and he still goes to jail. So that the total number of cases—and INSLAW has made a very detailed study of this—the number of times that society pays the cost of the exclusionary rule is minimal.

What kind of cases are they; they are narcotics cases. There are no triple murderers that go out of court because of the exclusionary rule. I am sure we would have known about them if that happened. It doesn't happen. It happens in narcotics cases and gambling cases, that is where the major cases have occurred.

In the INSLAW studies, a very respected organization, they found one murder case and no rape cases in which this kind of problem arose. So the numbers are very small.

Why does that cost have to be paid at all? It has to be paid, again, because a police officer was not properly instructed, did not know the law, he did not get a warrant when he should have. As Professor Kamisar says, we are looking in the wrong direction.

Why does that happen? If the police officer was properly instructed, if he followed the proper operations, there would be no trouble about this.

I teach police officers. I give instructions to police officers at my law school, and to private security guards in the area. They are very smart people, they are much better than my law students, I can assure you, and they pick this up very quickly.

Is it true that the Supreme Court changes the rule on them all the time? It is not true. The Supreme Court may change the rule in a limited area. Last year they had the *Mendenhall* case dealing with airport searches.

It is true that they had a major case, *Payton v. New York*, about going into the home without an arrest warrant, or going into the home without a search warrant, but is that brandnew law?

All the courts of appeal up until that time had decided that was the law already. It was not a great big breakthrough. It was a breakthrough because the Supreme Court said so in *Payton v. New York*, but the rule right down the line, all the major courts of appeal, had said consistently, "You can't break into a home without a search warrant, you can't break into a home without an arrest warrant."

So it is not true that they change the rules on them all the time. There are new cases that come up in one limited area. There is a new case that comes up in another limited area. But, the basic rules have been established.

Those basic rules have been taught to police officers. They learn them very quickly, and they know what the law is. That has been one of the major benefits of the exclusionary rule. When they mess up, they mess up not because the rules are not there. They mess up because they are not following the rules that have been taught them.

The exclusionary rule has been the basis for telling police officers what the rule is. In case after case, the basic rules on the fourth amendment have been laid down in exclusionary rule situations. In suppression motions, we have built up a whole body of law defining what the fourth amendment means through the exclusionary rule. In turn, that is the basis for telling police officers what the law is.

In preparing this testimony, I ran down some statistics on search warrants and arrest warrants, and on page 8 of my testimony, I discovered a remarkable thing. Federal magistrates are issuing fewer and fewer search and arrest warrants. In 1972, there were 7,338 warrants issued by Federal magistrates, and in 1980, it was down to 4,756, a decline of about 40 percent.

Senator MATHIAS. If you factored in the growth in the population, it would be an even larger decline.

Mr. FRIEDMAN. It is astonishing. In arrest warrants, the decrease has been greater, 36,000 issued by Federal magistrates in 1972, and only 9,000 in 1980.

We are talking about Federal officers. DEA agents, FBI are not getting warrants; why?

The Constitution says that they are supposed to get a warrant. They are getting warrants in fewer and fewer cases, even though the crime rate is going up. Why are they not getting warrants?

Warrants serve a very important function in the whole mechanism of the process. They require the police officer, the Federal officer to memorialize his evidence, to put down on paper what kind of evidence goes into probable cause, what did they have at that time to justify a search, to justify an arrest warrant.

It is true, it is a very perfunctory process, and a magistrate will issue it almost as a matter of course, but at least there is a paper

record established as to what they have at a given time, and that is the way we test it out later on, because that piece of paper, the affidavit that goes into an arrest warrant is then used by the defendant to see if the evidence was really there or not.

Why are Federal officers not getting warrants anymore? The Constitution has not been amended. Congress has not passed any legislation. In fact, the only changes that have been made in the rules are to make it easier to get a search warrant.

You can pick up a telephone now and call up a magistrate in the middle of the night, and say, "I am watching this motel. I am afraid people are going to move. I want to be able to go in and get it." On the basis of that telephone call, the magistrate says, "I hereby issue the warrant, go in and get it." The whole thing is recorded, and it is later used in court.

It is easier to get a warrant now, but officers are not getting warrants. Now they come to Congress and complain, saying "Make it easier. Don't make us get a warrant anymore, establish a good faith exception," despite the fact that the Constitution requires arrest warrants, and requires search warrants, and there has been no amendment to the Constitution to do it.

It seems to me that if they would follow the rules, and in almost every case if they want a piece of evidence, they are able to go in and get that evidence. All they have to do is follow the proper operations, follow the proper rules, and then will get the warrant, and they will get the evidence. So in the few cases where evidence is excluded, in the very few cases where evidence is excluded, the police officer, by proper operation, could have obtained that evidence.

It is not an absolute bar to effective law enforcement. It is a bar to ineffective law enforcement. It is a bar to ignorant law enforcement in the sense of law enforcement that does not follow the proper rule.

What is the benefit of the exclusionary rule? Why is it there?

It is not there so a few narcotics offenders should get out. It is there to protect the privacy rights of millions and millions of law-abiding citizens who would otherwise, if we did not have the rule be subject to police searches. I heard Mr. Carrington say, "Well, it is so confusing, and no one knows what to do." What is the alternative; to have no rule at all, so the police officers can do anything they want?

That is the only alternative on the other side to eliminate the exclusionary rule. Then, there is no incentive at all to follow the fourth amendment. That is the alternative.

Senator MATHIAS. His alternative in all fairness is a good faith rule.

Mr. FRIEDMAN. I heard him say that he does not like that, but he will accept it as a middle ground.

Let me say what I think is wrong with the good faith, if I could get to that. There already is a reasonableness requirement in the fourth amendment. We heard about a police officer can stop someone on reasonable suspicion. Suppose a court concludes that the suspicion was unreasonable, that is to say, he did not have reasonable suspicion. Could he reasonably believe in unreasonable suspicion. Are we now going to say that even though a court has con-

cluded that there was not enough to justify a frisk, he reasonably believes that there was?

In short, the fourth amendment already has a reasonableness requirement in it. When the courts say that a search was no good, or a pat down was no good, they are telling the police officer, "You acted unreasonably." The objective standard, a reasonable police officer under those circumstances would have known that this was not sufficient for a pat down, it was not sufficient for a stop, it was not sufficient for a full search. That is what the fourth amendment says against unreasonable searches and seizures.

Now we are saying, or we are asking the question if this legislation passes, "Could you have a good faith belief in something that a court has determined is unreasonable?" The line is there, the courts have determined it.

We are now going to have a good faith belief and unreasonable-ness. If the critics claim that the law is unclear, we are now going to have still another unclear rule. We are going to have what the fourth amendment really means, and we are going to have a rule which says what could a police officer reasonably believe that it means.

It seems to me that this is going to add even more confusion. If the problem is confusion, and they don't know what it is, to add a good faith exception, we are now going to have to psychoanalyze every police officer and decide, "Could you reasonably believe that this unreasonable stop was reasonable?"

That is going to establish still more confusion in the whole thing, and every time there is confusion, and I think Mr. Nicholson has a point there, every time there is confusion in the rules, there are two problems. One, the police officer is going to do nothing, and I don't think that this is a good thing to happen; or he is going to do something that, in fact, is going to violate the privacy rights of a citizen.

That is the point of the exclusionary rule, to establish, and there are modifications at the fringes, a clear line for everyone—in a clear line for a police officer so he will engage in effective law enforcement; in a clear line to protect the citizen, so that his privacy rights are not going to be violated.

To introduce a substantial violation rule, or a good faith rule, or an intentional violation rule, is to fudge the line, and we fudge the line to the detriment of effective law enforcement, and we fudge the line for the privacy rights of all Americans.

We don't want any more fudging of lines. We want a clear rule that works, and the clear rule that works so far—I don't think you can say that the clear rule doesn't work when the cost of the rule is a handful of narcotics violators that may go free, and that does happen. But it works in the sense of protecting the privacy rights of millions of Americans.

In my statement, I talk about some times when the whole system breaks down. The Zebra killings in San Francisco, when the mayor of the town then says: "Every young black male 20 to 30 years old has to be stopped and patted down for a weapon." Tens of thousands of law abiding citizens get stopped and frisked because they vaguely physically resembled the person they are looking for.

In Maryland, there is the famous case of *Langford v. Gelston*. There was a police murder in Baltimore, and police officers then went into and searched 300 private homes in Baltimore in the black section, and it is the minority citizens that generally get affected by this. Why; because of an anonymous tip that the murderer may be here or may be there. Then we have dragnet arrests, dragnet invasions.

This has happened in a rare number of instances, but with a good-faith exception, with a substantial violation rule, we are going to have that more and more. So the cost of losing the exclusionary rule starts to invade the privacy rights of all Americans.

So because the cost is low, the benefit is high, and the cost, such as it is, can even be lowered by better definitions, better training. So it seems to me that we are a lot better off in the current situation.

Mr. Schlag and I will be happy to respond to any questions that might come up.

Senator MATHIAS. I found the statistics that you cited interesting, and I want to repeat them so that they are clear in my mind. The cases in which the exclusionary rule is applied successfully to actually exclude some evidence, in only 1.3 percent of these cases is that application successful.

Mr. FRIEDMAN. That is correct, evidence is excluded.

Senator MATHIAS. In those cases in which evidence is in fact excluded as a result of the application of the rule, only half of them result in acquittal.

Mr. FRIEDMAN. Dismissal of the charges, that is right.

Senator MATHIAS. So that you can say, statistically, I am sure this is going to be challenged, only 0.65 percent of the cases of application of the exclusionary rule result in acquittals.

Mr. FRIEDMAN. That is what the GAO study says.

Senator MATHIAS. Let me take you back to Mr. Nicholson's testimony in which he says, you cannot apply such an empirical rule, and that the experience of officers and the experience of law enforcement officials would lead you to believe that there are so many previous points of decision along the way that that kind of a statistic is not really a valid one.

Mr. FRIEDMAN. The letter from the Justice Department that says: What about things that don't get into the process at all, that get screened out earlier. The GAO study talks about screening 9,400 potential felony violations of which 54 percent were accepted for prosecution. So there were many thousands which were not accepted for prosecution, and the GAO study takes that into account.

Then, of those that were not accepted for prosecution; how many were not accepted for prosecution because of a potential search and seizure problem, they have a figure there, 0.4 percent. So there is an attempt to deal with that precise problem.

What happens if the prosecutor will not even submit it to a grand jury because he knows, even though the grand jury can take illegally seized evidence, what is the point of going through because at the trial it is all going to get screened out. The GAO study suggests that we are in the same ball park, in less than one-half of 1 percent of the cases is that an issue. That strikes me as a very small percentage.

As small as it is, it could get smaller with the proper operations. It is not as if the police can never get a piece of evidence. I cite a few cases in my testimony, the *Chadwick* case, which went to the Supreme Court, in which the DEA agent managed to arrest the defendants at the one time when they couldn't look at the footlocker in the guy's car. They have the footlocker. It is not that they could not look at that footlocker.

The exclusionary rule was not a bar to prosecuting Chadwick. Chadwick was destined never to be prosecuted because of the exclusionary rule, that is nonsense. They have the footlocker with the narcotics in it. It was leaking talcum powder. A dog went over to that footlocker and signaled that there was marihuana. They have these magic dogs that can signal the presence of a controlled substance.

The police officers had it in their possession, and all they had to do was to take 10 or 15 minutes, or whatever it is, to type out a search warrant saying, "We have the following probable cause: leaking talcum powder. An agent from San Diego said that something was wrong here. The dog signaled the controlled substance." They go before the magistrate, and the magistrate says, "Okay, you can open that footlocker." If they had done it that way, Mr. Chadwick goes to jail.

It is not like the exclusionary rule is this impossible wall that no one can climb over. They climb over it very easily by properly going for a warrant.

Senator MATHIAS. I participated in some criminal appeals years ago involving numbers. There was a rash of numbers cases in Maryland when I was in the attorney general's office, a position somewhat like Mr. Nicholson's, I think. We had a lot of trouble with evidence. The question was, where you got the slips, the papers, and if they were visible on the front seat of the operator's car, that was all right.

Mr. FRIEDMAN. If they were in plain view.

Senator MATHIAS. If they were locked up in the trunk, you had more problems.

Mr. FRIEDMAN. We have these rules, and the Supreme Court thought they had established a whole rule last summer about, you can't search in the trunk, but you can search in the front of the car. Now I see the Supreme Court, having laid down this definitive rule in July, now want to reconsider it. That does happen.

The answer to that is, it seems to me, on-going instructions to the police officers. The fact of the matter is that the Supreme Court has established in these rules this sort of retroactive rule. If at the time the police officer acted, what he did was proper, the Supreme Court does not extend that rule back. They don't retroactively establish new rules.

Once the new decision comes down, and this happens all the time, the New York Police Department gets these instruction sheets on new rule. They get the training every week. They have trained instructors that go around the police stations to give them instruction on this.

The new rule is established, and once the new rule is established, and there is a clear line, then the police officers know what they can do, and they can engage in effective investigation.

It is only when there is confusion and uncertainty that we have the effect that Mr. Nicholson was talking about, hesitancy to investigate, and we have the problem on the other side, which is to say, the privacy rights of citizens is going to be endangered.

Once these rules are there, and they are properly followed, and warrants are secured in the appropriate cases, then the cost to society becomes minimal, and the benefit of the rule, a clear rule to protect the privacy rights, to make sure that millions of law abiding citizens do not have their homes invaded in the middle of the night, then the rule is working. It is a sound theory, and it works.

Senator MATHIAS. Fortunately, the committee has a distinguished member who has extensive experience with this, the distinguished Senator from Pennsylvania, Mr. Specter. I will see if he has any questions at this time.

Senator SPECTER. Quite a number, and I will ask one or two.

When you referred to the footlocker case, you commented that all the police officers had to do was to get a warrant authorizing the search. What is your view as to the reality of judicial protection for rights of privacy in terms of the magistrate declining the application for a search warrant, or is that step really just a rubber stamp of what the law enforcement officer requests?

Mr. FRIEDMAN. It is a rubber stamp. There are so few cases in which a magistrate declines a search warrant. The experience of almost all law enforcement officers that I know of is that it is done almost automatically. It doesn't mean that it is a bad thing.

As I explained before, the Federal law enforcement officer has to put down on paper what he has at that point, what is his probable cause, why does he think there is probable cause to believe a crime has been committed and that evidence relating to that crime is at a certain place. Was it an informant? Was it someone else? Was it eyewitness activity?

It has to be put down on paper, and it is put down on paper before the search is made. At that point, it is part of the record, and later at a suppression hearing, it is the chief evidence by which the suppression motion is accomplished.

Senator SPECTER. But that relates to whether the evidence is suppressed or not. It does not relate to whether the privacy of the party searched is intruded upon.

Mr. FRIEDMAN. I suppose, to that extent, it serves the purpose. Suppose it turns out that probable cause was not sufficient when the search was made, and a case is brought later on by the private citizens, and suppose nothing turns up, they made a search of a place where there was no evidence.

Senator SPECTER. Are you saying that there is an improvement because of a claim for damages?

Mr. FRIEDMAN. That is right.

Senator SPECTER. As opposed to protecting the right of privacy from an inappropriate search?

Mr. FRIEDMAN. It seems that those two things work hand in hand. If the police officer is going to be sued later on because it was not sufficient, and the search warrant requirements at that time were put down on paper, it will allow the suit to go forward in a more effective manner.

Senator SPECTER. How many successful suits are there?

Mr. FRIEDMAN. A 1983 case is very rare. There are not a lot of them, because law abiding citizens who are invaded by the police—there is this famous Collinsville raid out in Indiana, and those people have not collected. DEA agents got the wrong house. They came in there and roughed everybody up—

Senator SPECTER. If you follow through, and say that there are not many damage suits which are successful, so that that remedy is not very meaningful, then you are saying that the requirement of the warrant does not really stop the law enforcement officer from intruding on privacy, if in effect it is an inappropriate search and seizure.

Mr. FRIEDMAN. It helps in this way. I think it is a little more complicated. I think the model you have in mind is that the law enforcement officer brings in his evidence and says, "I think there is evidence here, and I want to go into that house." Then, the magistrate says, "No, there isn't enough evidence. I am not going to let you do it." Then, everybody walks away.

That is the way it was done maybe in the 18th century, when they really put everyone to the test.

Senator SPECTER. Did they do that in the 18th century; where?

Mr. FRIEDMAN. In Boston in 1773, I think that was where the whole theory of independent magistrates really testing the probable cause.

Senator SPECTER. That was even before the fourth amendment?

Mr. FRIEDMAN. That is why we have the fourth amendment, I suppose.

I think it works in a different way. The magistrate will issue the warrant, and the search will be made. Then, a later court will say, "That was not a proper search, and there was not enough probable cause under those circumstances." Then the police officers are instructed that that is not enough to justify a search.

The first person who was injured, that is the first law-abiding person whose house was invaded, or non-law abiding, it doesn't make any difference—

Senator SPECTER. It is all part of the education?

Mr. FRIEDMAN. It is part of the education. It is part of the process.

Senator SPECTER. If the policeman has to get a search warrant, he may not get around to it, so he may not intrude on somebody's privacy.

Mr. FRIEDMAN. What he is now doing, he is going in without the warrant. In my testimony I laid down some statistics that they are relying on warrants less and less. So we don't even have the benefit of the paper record which could be later tested in court.

Senator SPECTER. We frequently say that we would prefer to let nine guilty go free than to convict one innocent person.

Mr. FRIEDMAN. That is correct.

Senator SPECTER. Or 99 to go free, or 999 to go free, or whatever number.

Mr. FRIEDMAN. Right.

Senator MATHIAS. We amended that rule in your absence this morning to say, "unless it gets to be too many."

Senator SPECTER. I shan't probe for that point. But I will ask whether you would apply the same standard to the invasion of pri-

vacy. Would you let nine guilty defendants go free to protect the privacy of one innocent person?

Mr. FRIEDMAN. I think we have to alter it because it is true if there is good evidence. Chadwick was in fact carrying 200 pounds of marihuana, and he went free. There is no question, Chadwick went free.

Senator SPECTER. Do you think there would have been a different result if Chadwick had the body of a woman in his footlocker who he had been living with for a year and a half and who disappeared several months before? That case arose in Philadelphia.

Mr. FRIEDMAN. That murderers, in fact, went off scot-free.

Senator SPECTER. No, a search-and-seizure issue like *Chadwick* without marihuana, but with a body instead. Do you think that a different rule of constitutional protection applies depending on what the charge is, and what evidence is uncovered?

Mr. FRIEDMAN. No; it doesn't, and it shouldn't.

Senator SPECTER. I agree with your latter assertion.

Mr. FRIEDMAN. I will say this, the experience has been that the exclusionary rule is applied primarily in narcotics cases, because if you exclude the narcotics, that is it. Then, there is no other evidence.

Senator SPECTER. If you were sitting as a judge in a suppression hearing, are you sure you would be able to apply the same kind of a standard to marihuana in a footlocker as opposed to a body in a footlocker?

Mr. FRIEDMAN. They should. I know how judges react. Judges do not like to see murderers escape scot-free.

Senator SPECTER. If you were sitting as a judge in a suppression hearing, are you certain that you could apply the same standard whether or not it was marihuana or the body of a person?

Mr. FRIEDMAN. I would hope I could. I would hope, that most judges would. I tend to think that they are going to make it a lot harder in a suppression hearing involving a dead body.

Senator SPECTER. Are you certain you could?

Mr. FRIEDMAN. I think I could.

Senator SPECTER. Back to the nine going free to protect the privacy of one—or would you say that the guilty have the same privacy right as the innocent?

Mr. FRIEDMAN. They do have that. But I think the fact of the matter is—

Senator SPECTER. Do you fashion a standard attaching the same values for privacy to the guilty as opposed to the innocent?

Mr. FRIEDMAN. Absolutely, that is what the fourth amendment means, everybody's rights.

I think what in fact happens in the exclusionary rule, and I think the way the test should read, should 20 guilty people go free a year—this is what the GAO study talked about: Should 20 narcotics violators go free a year to protect the privacy of millions of Americans; that is the reality. It is not nine to one. It is 20 to 50 million, because the total number in the GAO study of people who made a successful suppression motion, and who were later acquitted, is 20.

Senator SPECTER. If we are not so sure about the GAO statistics, or if we want to explore the matter further, what is your judgment

on my question about letting nine people go free in order to avoid the invasion of privacy for one person?

Mr. FRIEDMAN. I think the same principle has to apply there. I think the privacy rights of Americans are very important.

Senator SPECTER. You think that privacy rights, then, would be the same as the right of the innocent not to be convicted.

Mr. FRIEDMAN. I do. But, as I said, I think the reality is the opposite. It is true they are all guilty, that is to say guilty in the sense that we have talked about it.

Senator SPECTER. I think you may carry your principle a little far.

Mr. FRIEDMAN. That is right. It is not just one American. If the police understand that they can invade indiscriminately because the rules are not being applied, it is not just one American that is going to be hurt.

Senator SPECTER. Does Congress have the authority to legislate in this area? I did not see that question addressed in your statement.

Mr. FRIEDMAN. Mr. Schlag does.

Senator SPECTER. My metroliner unfortunately precluded my hearing any such discussion, if one preceded my arrival.

Mr. FRIEDMAN. Let me just say this about the Congress attempt to overrule *Miranda*. They did pass a law, and the courts don't pay any attention to it, and that is the reality.

Senator SPECTER. Are you talking about the Omnibus Crime Control Act of 1968?

Mr. FRIEDMAN. That is correct.

Senator SPECTER. Has that been litigated, reasonableness in light of the totality of circumstances?

Mr. FRIEDMAN. Pierre, do you know?

Mr. SCHLAG. I am really not that familiar with it.

Mr. FRIEDMAN. All I know is that no one pays attention to it.

Senator SPECTER. I raised the issue in *Kupp v. Oregon*, which was decided by the Court in 1969, but they did not address the issue.

Mr. FRIEDMAN. They just treat it as if it is not there.

Senator SPECTER. Has any Attorney General of the United States sought to enforce that provision of the Omnibus Crime Control Act of 1968?

Mr. FRIEDMAN. I don't know that they even cite it because as I read the cases, and I teach this stuff, it just doesn't seem to come up. I don't know why the attorneys general are not making a huge fuss about it.

Senator MATHIAS. Let's ask Mr. Carrington and Mr. Nicholson if they know the answer to that question.

Mr. CARRINGTON. Senator, I think there is one case in the southern district of New York where the title II provisions were advanced. I will try to dig that up for you.

Senator SPECTER. Was that a district court?

Mr. CARRINGTON. Yes.

Senator SPECTER. The *Miranda* warnings were not given, and the confession or admission was admitted?

Mr. CARRINGTON. If I recall correctly, they were given, but they were given in a faulty manner by the police officer. Similar to that

classic Pennsylvania case where the police officer said, "Anything you say can be used for or against you." *Comm. v. Singleton*.

Senator MATHIAS. I will direct the staff to look at that case, and make a note in the record.

Mr. FRIEDMAN. It is similar to no busing. Congress could pass a law saying no busing for purposes of racial equality, but suppose there is a constitutional violation and busing is ordered to remedy a constitutional violation, and congressional saying that that constitutional remedy can't be implemented; the Federal courts are not paying attention to that, or I don't think they would. I think we have a similar situation.

If it is a constitutional remedy, it is only an amendment to the Constitution that can affect that remedy, or the Supreme Court changing its mind. But in the same way that I don't think Congress can affect the constitutional remedy for the *Miranda* violation, or the constitutional remedy for—

Senator SPECTER. Is it a remedy? Not *Miranda*, because it is search and seizure, but in *Mapp*, the Court said that the exclusionary rule was a constitutional mandate, and part of the fourth amendment.

Mr. FRIEDMAN. Right.

Senator SPECTER. So what is this talk about remedy?

Mr. FRIEDMAN. I am using the nomenclature because everyone else seems to have done it.

I don't see how the exclusionary rule—We are back to what Madison said when he introduced the bill of rights, "It is the courts who will enforce these provisions." *Mapp* was not so much establishing a new remedy. *Mapp* was the result of the Supreme Court incorporating the fourth amendment into the fourteenth, and when they incorporated that amendment, they incorporated the entire amendment with the exclusionary rule attached to it.

Senator SPECTER. If that is so, then is it not different from the busing case, where we may argue about whether the Congress may constitutionally limit the jurisdiction of the courts, but that is a really different consideration—

Mr. FRIEDMAN. I agree.

Senator SPECTER [continuing]. If the U.S. Supreme Court has said that the exclusionary rule is a part of the due process clause of the fourteenth amendment.

Mr. FRIEDMAN. I think that this is a better way of looking at it.

Senator SPECTER. One of the most colorful and impressive expositions that I have heard from a police point of view on the search and seizure issue is the treatise that Commissioner Frank Rizzo used to declaim on: The police are in an exhaustive chase at high speed, must make split-second decisions on a variety of subjects like search and seizure, and then the U.S. Supreme Court ponders the question for years, decides 5 to 4 that it is unreasonable. How can you ask a policeman to respond in the time parameter he has, and as a corollary—although Commissioner Rizzo did not use the word "corollary"—exclude the evidence when he fails?

Mr. FRIEDMAN. The basic fourth amendment rules: What is probable cause? When do you need a search warrant? What are the exceptions to the search warrant requirement? What are the arrest warrant requirements?

Those basic rules that govern the day-to-day activities of the police officer on what is reasonable suspicion, they are instructed, they are given a lot of instructions, and they know about it.

Senator SPECTER. So are the judges, but four of them thought that it was constitutional.

Mr. FRIEDMAN. The Supreme Court had a case last year, *Michigan v. Summers*. They had a search warrant for the home, and the person was coming up the steps and they detained him until they had completed the search, and then when they had completed the search, they discovered enough to arrest him. They did not have probable cause initially. The Michigan court split 8 to 7 on that issue.

Senator SPECTER. It is a big court.

Mr. FRIEDMAN. No, they counted all the judges. The district court judge, the suppression judge, and the intermediate judges. It was eventually an 8 to 7 split between the Michigan judges. This was exactly the problem that you are talking about. Did the police have the authority.

Senator SPECTER. You have restated the problem.

Mr. FRIEDMAN. My point is that it is not like this is going to affect every decision by every police officer.

Senator SPECTER. What about the decision in the case. It is very tough, and the police officer has made a judgment, and four Justices of the Supreme Court have said it was a reasonable approach. Is Commissioner Rizzo totally off base in saying it is asking too much to exclude the evidence in that case?

Mr. FRIEDMAN. I want to carry that out. My answer is, it does happen, but it happens rarely. Then when there is a new rule established, then police officers are going to be properly instructed as to what to do in that situation.

Senator SPECTER. But you make the rule prospective. What would you think of a rule which said that if more than 40 percent of the court, take the filibuster rule, or more than a third of the court, take the constitutional amendment route, or more than 25 percent of the court, take the State ratification, think that it is a constitutional search and seizure, then it stands in that case, and for the future it is different?

Mr. FRIEDMAN. That is what happened in *Chadwick*. What happened in *Chadwick* was that the search was made, I forget, in 1975. *Chadwick* went home free, that is true. *Chadwick* got off, but every search that was made before June 1, 1977, involving the identical facts, that person did not get off.

The courts of appeal have been uniform about not applying *Chadwick* retroactively to searches which occurred before that date. So of the total number of searches involving a piece of luggage—

Senator SPECTER. But that does not answer my question for *Chadwick*.

Mr. FRIEDMAN. That is right.

In the grand scheme of things, we allowed *Chadwick* to get off for a reason. We don't allow all the other *Chadwicks* to get off, that is to say, other people in exactly the same position.

Senator SPECTER. Is that fair?

Mr. FRIEDMAN. It is fair.

Senator SPECTER. It is not discriminatory?

Mr. FRIEDMAN. It is fair because of the whole way in which courts operate. That is to say, you always allow the individual litigant to take advantage of the fact that he fought that fight.

Senator SPECTER. But you are really on a different point than the one I am raising.

If the case is so complex that four out of nine Supreme Court Justices think it is reasonable, how can you expect the police officer to do better?

Mr. FRIEDMAN. All I am saying is, one defendant and one police officer are paying a price.

Senator SPECTER. But that is not the question. The question is, How can you expect more of a police officer than you can of four Supreme Court Justices? The issue is, the police officer has to interpret what is a constitutional basis for a search and seizure, and he has got 4 minutes to decide, or less, or 40 minutes.

Mr. FRIEDMAN. Right.

Senator SPECTER. The Supreme Court considers the case for a year. Why do you expect the police officer to do better than the Justices?

Mr. FRIEDMAN. It is tough on him, and it is true. My answer to that is that the alternative is 50 times worse. The alternative is no rule at all. The alternative is, let's not have an exclusionary rule.

Senator SPECTER. What about a rule where a third of the court or more think it is constitutional; it stands?

Mr. FRIEDMAN. I don't like that either because I want the police to know what they are supposed to do, even though occasionally, and I think it is a very rare instance, there is a police officer's judgment that is so close that four Justices think that it is right. That is the cost that we have to pay for trying to establish a rule as clearly as we can, so that everyone knows what they can do in the future.

Senator SPECTER. But you think it inappropriate to apply retroactively.

Mr. FRIEDMAN. To other searches, I am going to allow it because he is the one who fought the fight.

Senator SPECTER. What did you think of the *Miranda* rule which was applied to cases which had been investigated, but not brought to trial at the time *Miranda* was decided.

Mr. FRIEDMAN. *Miranda* was not retroactively applied to confessions that were made before the date of the decision.

Senator SPECTER. Yes; it was. It was applied to police work which was completed where cases were not brought to trial prior to June 13—

Mr. FRIEDMAN. In other words, there was a different gap there because it had to do with the date it applied.

Senator SPECTER. A very significant gap on some very important cases. What do you think of that?

Mr. FRIEDMAN. Senator Spector, there is another jurisprudential rule that goes into effect there, and it has nothing to do with *Miranda*, it doesn't have to do with the fourth amendment, and tort law as well. The first person who establishes a new rule, he gets the advantage of having fought that fight. But if new substantive rules are established on people after the date of the decision that

does not get retroactively applied. It is not just the fourth amendment, or *Miranda*.

Senator SPECTER. What you were talking about would say that *Miranda* should have the benefit, even though his trial started before the date of the *Miranda* decision, necessarily.

Mr. FRIEDMAN. That is correct.

Senator SPECTER. But it should not be for the benefit of other defendants who were interrogated by the police, but whose trials did not start until after the date of *Miranda*.

Mr. FRIEDMAN. That is a retroactivity problem. It is not a fourth amendment or fifth amendment problem. It applies across the board. So I don't think that the exclusionary rule should have the weight of the whole—

Senator SPECTER. It is sort of a fourth, fifth, and sixth amendment problem.

Mr. FRIEDMAN. It is because a lot of these rules—we have the whole Supreme Court decision in *Linkletter v. Walker*, about when do you apply a retroactive rule, it depends on the integrity of the truth finding process, and sometimes they do, and sometimes they don't.

Don't say, let's eliminate the exclusionary rule because there are retroactivity problems, I don't think that is fair.

Senator SPECTER. That was not my question, my question was something different. My question was whether you thought *Miranda* was properly applied retroactively.

Mr. FRIEDMAN. I could see a different argument for applying *Miranda*. It depends on when the confession was taken, as opposed to when the trial occurred. It seems to me there are other lines you could draw in that situation.

[Statement of Mr. Friedman and memorandum of law follow:]

STATEMENT

of

PROFESSOR LEON FRIEDMAN
HOFSTRA UNIVERSITY SCHOOL OF LAW
ACCOMPANIED BY PIERRE SCHLAG, ESQ.

My name is Leon Friedman and I welcome the opportunity to testify before this committee on S.101 and S.751 on behalf of the American Civil Liberties Union.

The two bills would limit or eliminate the exclusionary rule in federal criminal proceedings. S.101 would eliminate the exclusionary rule in federal court except where a Fourth Amendment violation was "intentional" or "substantial." We believe that this proposed legislation is unconstitutional. Furthermore it is ambiguous in its reach and uncertain in its application and would create severe problems in the criminal justice process.

S.751 would eliminate the exclusionary rule in federal criminal proceedings entirely and would provide a limited damage remedy against the United States and authorize disciplinary action against those who violate a citizen's Fourth Amendment rights. This bill is, in our view, beyond Congress' power to enact.

Fundamentally we believe that any legislation to eliminate, limit or restrict the exclusionary rule is unconstitutional, unwise and undesirable. The exclusionary rule, though a judicially made remedy, is of constitutional dimension. Furthermore the rule serves the best interests of both law enforcement and the privacy interests of all Americans.

It is our position that there is no need for attempting to change the exclusionary rule at this time. The rule is simply not a serious problem for law enforcement at this time, particularly at the federal level. Put another way, the cost of the exclusionary rule to society is quite low. Furthermore the cost can be lowered by better training and instruction. The exclusionary rule is not a bar to effective law enforcement but ineffective law enforcement. Finally the benefit to society and law enforcement by adhering to the exclusionary rule is considerable. It is sound in

theory and it works. I will develop each of these points in my testimony today...

Cost of the Exclusionary Rule

Whatever studies have been made of the exclusionary rule emphasize the relatively low number of instances in which it produces the evil which has prompted the legislation -- setting the criminal free because the constable has blundered. The GAO study, Impact of the Exclusionary Rule on Federal Criminal Prosecution (Report by the Comptroller General of the United States, April 19, 1979) shows how rare suppression motions are made, how rare they are successful and how seldom they lead to release of the defendant. In the GAO study it was found that in only 16% of the 2408 cases analyzed was a suppression motion made. All in all in only 1.3% of the 2804 defendant cases (or 36) was evidence excluded. In only 3% of the 16% was the motion granted in total and in only about 9% was the motion granted in part. Typically in the latter situation the defendant will move to suppress some evidence in one place and other evidence in another place. In United States v. Russell, 655 F.2d 1261 (D.C. Cir. 1981) the defendant's car was stopped because it lacked license plate. The police saw a glossine envelope containing a white powder in the glove compartment. They arrested the defendants, found a gun in a paper bag under the seat and also seized a grocery bag with heroin in the hatch-back section of the car. The Court of Appeals affirmed the conviction for the weapons offenses but reversed the conviction for possession of the heroin in the grocery bag. Though he won a suppression motion on the heroin, the defendant did go to jail on the weapons charges.

Even if the motion is granted the GAO study concluded that in half of the cases (about 20 cases) the defendant was convicted nevertheless and in about 20 cases the charges were dismissed. That does not mean that the defendant went free altogether. In many situations the government may try to introduce the evidence on some theory other than the one originally urged.

Thus in Mincy v. Arizona, 437 U.S. 385 (1977) certain evidence was ordered suppressed by the Supreme Court. The State had argued that there should be a "murder scene" exception to the Fourth Amendment and the warrantless search was justified by exigent circumstances. The Supreme Court rejected that argument. The State then retried the defendant, arguing that some evidence was in plain view after Mincy's arrest and other evidence, such as the blood on the floor would have been lost or destroyed if they had to obtain a warrant. The trial court agreed and Mincy was convicted of the homicide charges. Similarly in Brewer v. Williams, 430 U.S. 387 (1976) the famous "Christian burial speech" case certain statements made by the defendant were suppressed because they were made after his lawyer had entered the proceedings and had told him not to talk to the police. Chief Justice Burger in his dissent said that the result of the case "ought to be intolerable in any society which purports to call itself an organized society." But Williams was retried and found guilty even after his statements were suppressed. State v. Williams, 285 N.W.2d 248 (1979).

In Franks v. Delaware, 438 U.S. 154 (1977) the Supreme Court held that a warrant ~~could~~ not be upheld based on material misrepresentation contained in it, but on remand the Delaware Supreme Court upheld the search warrant based on other evidence besides that claimed to be erroneous.

In addition the various studies made of the impact of the exclusionary rule indicate that suppression of evidence does not occur in cases involving murder, assault or rape. It occurs primarily in narcotics or gambling cases. A study prepared by the Institute for Law and Social Research confirmed the low incidence of dismissals for due process violations. In less than 1% of the arrests studied was prosecution declined because the police failed to protect the defendant's constitutional rights and thereafter it became a problem at

the prosecutorial level in only 2% of the cases. INSLAW, "What Happens After Arrest," May, 1978. In a later study "A Cross-City Comparison of Felony Case Processing," April, 1979, INSLAW concluded that due process reasons had "little impact on the overall flow of criminal cases after arrest." Among the cities studied, Washington, Salt Lake City, Los Angeles, New Orleans, there was only one homicide arrest rejected for due process reasons and no rapes. Drug cases accounted for most of the rejections.

In summary the "cost" to society of the exclusionary rule is quite low: very few defendants walk out of the court-house free of all charges because the constable has blundered. Those few who do may be retried on other charges or theories. And the cases in which successful suppression motions are made rarely involve major index crimes, murder, assault, or rape.

The Reasons for Successful Suppression Motion

More important, the "cost" has to be paid only because a law enforcement officer has not followed the proper procedures. As I said above, the exclusionary rule is a bar to ineffective law enforcement, that is, it operates only when a blunder has occurred by the police. And in virtually every case in which suppression is required, proper operation by the police would allow admission of the evidence.

Let me offer a few examples. In a recent case in the First Circuit, United States v. Adams, 621 F.2d 41 (1st Cir. 1981) the FBI had obtained information that an escaped murderer might be hiding out in a house in Revere, Mass., where a former cell-mate lived. On a Wednesday afternoon they heard from a social worker who visited the house that the murderer was there. Did they do anything that afternoon? No. The next morning they checked again to find out whether the murderer was still there. At 8:00 A.M. on Thursday they determined from the social worker that she was. At 9:50 A.M. without obtaining a search warrant or an arrest warrant seven FBI agents and local police converged

on the house, came into it and arrested the fugitive.

The government then pressed charges against the former cell-mate for harboring the fugitive. (The fugitive could not assert any rights herself since the exclusionary rule has never operated to suppress the person of the arrestee from later charges. Only evidence can be suppressed, not the person arrested). The government argued that there were exigent circumstances justifying a warrantless entry. The court rejected that argument. "There was no reason why either an arrest or search warrant could not have been obtained during the afternoon or evening of October 16. Like the district court, we are incredulous at the magistrate's finding that the agents might reasonably have assumed that a magistrate or judge would not be available at 8:30 A.M." 621 F.2d at 44-45.

If the agents had acted immediately on Wednesday afternoon -- if they had treated the matter themselves as an emergency -- the search would probably have been upheld. If they had obtained a warrant in the morning, and it is possible to obtain a warrant by telephone under Rule 41(c)(2) of the Federal Rules of Criminal Procedure, the search would have been proper. But the FBI took their time and then failed to get a warrant. The harboring charges against Miss Adams had to be dismissed.

Similarly in United States v. Chadwick, 433 U.S. 1 (1977) DEA agents staked out a railroad station waiting for someone to pick up a footlocker suspected of containing narcotics. Two people picked up the footlocker, carried it to the trunk of the car and then went to the front. They were then arrested, the footlocker was seized, taken to the police station and opened, revealing some marijuana, all without a warrant. The Supreme Court ordered the evidence suppressed.

If the DEA agents had arrested the persons while they were carrying the footlocker and examined it immediately, the search would probably have been upheld as a warrantless search incident to an arrest. If they had sought to obtain a search warrant after seizing the footlocker, they would certainly have obtained

one since there was probable cause to believe it contained marijuana. They certainly had the right to seize and hold the footlocker until they went before a magistrate. But the DEA took the one path out of many alternatives that was later found improper. The charges against Chadwick were dismissed.

In case after case decided by federal courts up to the Supreme Court, the courts tell law enforcement officers that they managed to take the one illegal or unconstitutional path where any other procedure would have been proper. Why does this happen?

While I was preparing this testimony I did some research on the number of search warrants and arrest warrants obtained by federal officers from federal magistrates. I discovered what I consider a startling statistic. In the years from 1972 to 1980 there has been a steady decline in the number of warrants issued by federal magistrates. According to the 1980 Annual Report of the Director of the Administrative Office of the U.S. Courts (at p.140) the warrants issued over the years have gone down:

	<u>Warrants issued by federal magistrates</u>					
	<u>1972</u>	<u>1976</u>	<u>1977</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>
search warrants	7,338	6,068	5,203	4,491	4,606	4,756
arrest warrants	36,833	19,904	17,716	14,721	11,423	9,721

The Fourth Amendment requires that warrants issue for both arrests and searches, signed by an independent magistrate who has determined that there is probable cause for a search or seizure. Even if the grant of a warrant is now quite perfunctory, warrants serve as an important paper record, requiring law enforcement officers to memorialize the evidence they have obtained before a search or seizure is made. This allows a court to test their claims and weigh their evidence in a later adversary proceeding. But federal law enforcement officers are seeking warrants less and less.

The federal rules of criminal procedure were changed in 1974 to allow summons to be issued instead of warrants in some

cases but since only 1,552 summons were issued in 1980, that cannot explain the difference. More important the rules were changed in 1977 to make it easier to obtain a search warrant, by telephone, yet the number of search warrants have declined by close to 40% since 1972.

Federal officers are simply not seeking or obtaining warrants in cases where the Constitution would require them. And they are doing so in more and more cases while the crime rate has increased. The Constitution has not been amended to eliminate the need for warrants. The Supreme Court held in United States v. Watson, 423 U.S. 411 (1976) that arrest warrants were not necessary to effect an arrest in a public place but they held later in Payton v. New York, 445 U.S. 573 (1980) that they were necessary to invade a private home. The deep drop in arrest warrants cannot be explained as merely a reaction to the Supreme Court decision in Watson.

Thus we still have to ask why federal officers are seeking fewer and fewer warrants. Either they are lazy (it takes time to type up a warrant, seek out a magistrate, etc) or they are afraid to test out their proof of probable cause before a magistrate or even to write it down so it can be challenged in later court proceedings. Or they are responding to the growing criticism of the exclusionary rule and are assuming that the courts will back them up. This development does not contribute to respect for the law or the courts or to the need to protect the privacy of the American people.

The benefits of the exclusionary rule

It must be remembered that the purpose of the exclusionary rule is not to protect a handful of drug dealers and allow them to go free. Contrary to what White House counselors may say, the ACLU is not part of a criminal lobby trying to get criminals out on the street as fast as we can. The purpose of the exclusionary rule, and the Fourth Amendment is to protect the privacy rights of all Americans, in particular the millions of

law abiding Americans who would otherwise be subject to seizure of their persons or invasions of their homes because the police are looking for a criminal. Without the protection of the Fourth Amendment dragnet arrests or seizures and indiscriminate breaking into homes would become a frequent occurrence.

Just to remind the Committee of what could happen, a few years ago there was a search for the so-called Zebra killings in San Francisco. There had been 17 murders of whites in late 1973 and 1974 and two young black males were described as the assailants. The police department issued a directive to stop and pat down all young black males in the city of San Francisco, 20 to 30 years old, 5'8" to 6" tall. A law suit was immediately filed to stop this indiscriminate frisking of tens of thousands of innocent citizens who merely had some of the same physical characteristics of the suspects. See Williams v. Alioto, 549 F.2d 13b (9th Cir. 1977).

In an earlier case in Baltimore, Langford v. Gelston, F.2d (4th Cir. 1966) the police in Baltimore invaded 300 private homes in the black section of the city looking for suspects in a police killing. They had no warrants to do so and in most cases the searches were based on unverified anonymous tips. They broke into homes at all hours of the day or night without verifying the tips they received. A federal court issued an injunction against any further invasions.

I am afraid that without the full protection of the Fourth Amendment and the exclusionary rule, dragnet arrests or frisks and indiscriminate break-ins of homes could become a far more frequent occurrence.

The importance of the exclusionary rule as the essential remedy to protect the requirements of the Fourth Amendment has been repeated in case after case. See United States v. Calandra, 414 U.S. 338, 348 (1974). In the accompanying memorandum we discuss the various rationales which have been cited to justify the exclusionary rule -- personal rights, judicial integrity, or police deterrence. But at its heart the exclusionary rule

is crucial for Fourth Amendment protection for two interrelated reasons: (1) the criminal cases excluding evidence by reason of the exclusionary rule are our chief means of defining the limits and meaning of the Fourth Amendment; (2) the exclusionary rule provides the key incentive for making law enforcement officers obey the law.

Definition : The general words of the Fourth Amendment are not self-defining or self-enforcing. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized."

What is probable cause? How is it determined? Are there any exceptions to the warrant requirement? What is the plain view doctrine? How is consent determined? How far may a police officer search incident to arrest? What is a Terry stop? What justifies a pat-down of a suspect?

We have now built up an elaborate body of law answering these and other questions. But it has been done by state and federal courts applying the exclusionary rule in case after case on motions to suppress evidence. Without the exclusionary rule, there would be no occasion to worry about probable cause, plain view, consent, pat-down, Terry stops and so on. It is true that civil suits for damages under 42 U.S. § 1983 require the definition of Fourth Amendment protection. But Fourth Amendment violations rarely produce §1983 cases and successful actions are rarer still. Citizens do not bring civil suits for damages under §1983 for bad stops, searches, arrests or seizures. Suits for injunctive orders generally require department-wide or jurisdiction-wide problems before relief can be granted, as in the Williams or Langston cases. It is only

because of the exclusionary rule that we have built up a basic set of rules of what the Fourth Amendment means. That definitional and educational function has been one of the chief benefits of the Weeks and Wolf rules. In short the law enforcement community have learned what the Fourth Amendment means primarily because of the exclusionary rule.

Enforcement: Once having learned what the rules require, the police must be given an incentive for obeying them. It defies logic to say that the Fourth Amendment means what the courts say it means but the police do not have to pay attention to what the rules are. When we say that the exclusionary rule acts as a deterrent what we mean is that the courts are telling the police that they must obey the law. Otherwise the courts would become accomplices to the violations that occur. For the courts to tell the police that they can disregard the basic tenets of our fundamental charter, that the rules do not mean anything as far as they are concerned, is to ignore the entire meaning of the Bill of Rights. When James Madison introduced the first ten amendments to the Constitution, he relied on the courts as the chief mechanism of enforcement. "If they [the amendments] are incorporated into the Constitution, independent tribunals of justice will consider them in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." Should we now say that Madison was wrong, the courts should not be a guardian of Fourth Amendment rights, they should not resist encroachment into privacy rights by the police, that they should be a penetrable bulwark when the police invade our homes. To tell the police that they can violate the law is to teach society a terrible lesson, as Justice Brandeis said in his famous dissent in Olmstead v. United States, 277 U.S. 438, 483 (1928). "When

the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of the acts in order to accomplish its own ends, it assumed moral responsibility for the officers crimes.... and if this Court should permit the Government, by means of its officers' crimes, to effect its purposes of punishing the defendants.... the government itself would become a lawbreaker.

..... In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the patent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." As Brandeis said, the end does not justify the means since the consequences of sanctioning official lawbreaking would bring "terrible retribution." The police would learn again the advantages of breaking the law, at a terrible cost to the privacy of us all. As Yale Kamisar has written, it was only when the exclusionary rule was applied to the states, that state police officers began to pay attention to the requirements of the Fourth Amendment. Every time a police officer asks his superiors what he is supposed to do, when he can invade a home or stop a car or search a citizen and he is told what the rules are, then the exclusionary rule is working. We cannot retreat into the dark days before Weeks and Wolf.

As Mr. Schlag's memorandum indicates, we believe it is beyond the Constitutional power of Congress to enact S.101 and S.751. Furthermore the specific language of those bills are ambiguous, vague, unenforceable and inconsistent with the purpose of the Fourth Amendment. The good faith exception would introduce a vague, confusing concept into Fourth Amendment jurisprudence. Instead of one bright line definition of what the Fourth Amendment means, are we to have three or four definitions:

(1) what the Fourth Amendment requires; (2) what is a substantial violation requiring application of the exclusionary rule; (3) what is an intentional violation; (4) what violation will give rise to a suit for damages. Such a confusing approach should not be written into law. We have one Fourth Amendment. It has worked and we should not allow it to be eroded away if we are concerned about protecting our right to privacy.

September 23, 1981

MEMORANDUM IN SUPPORT OF ACLU POSITION
ON EXCLUSIONARY RULE LEGISLATION

Two bills are pending in the Senate that would limit or eliminate the exclusionary rule in federal criminal proceedings -- S. 101 and S. 751. The exclusionary rule holds that papers or things seized or obtained in violation of the Fourth Amendment may not be used as evidence in a criminal proceeding.

S. 101 would eliminate the exclusionary rule in federal criminal proceedings except where a Fourth Amendment violation was "intentional" or "substantial." We submit that this proposed legislation is unconstitutional. Even assuming its constitutionality, S. 101 is ambiguous and uncertain in its reach and would cause severe problems in the criminal justice process.

S. 751 would eliminate the exclusionary rule in federal criminal proceedings entirely and would provide instead a limited damage remedy against the United States and authorize disciplinary action against offending law enforcement personnel. It is our position that this kind of legislation too is beyond Congress' constitutional authority.

A single additional point should be made at outset. Much of the discussion of eliminating the exclusionary rule takes as a premise that the exclusionary rule has had something to do with the nationwide growth of

serious crime. That view was reinforced by the Final Report of the Attorney General's Task Force on Violent Crime (August 17, 1981), which made a modification of the exclusionary rule along the line of what is proposed in S. 101 one of its key recommendations for dealing with the crime problem. To act on the belief that the elimination or modification of the exclusionary rule would give the citizenry reason to feel more secure in their homes or on the streets is to fall victim to a cruel deception.

A study by the General Accounting Office of federal criminal prosecutions revealed that in only 1.3 percent of the 2,084 cases studied was evidence excluded as the result of a Fourth Amendment motion. And exclusionary rule problems were the primary reasons for prosecutorial decisions not to prosecute in only .4 percent of cases analyzed in which a decision was made not to prosecute. Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (Report No. GGD-79-45) (April 19, 1979).

Elimination or modification of the rule cannot be justified as contributing to more effective law enforcement by reference to these data. No large numbers of guilty men and women are going free as a result of the application of the exclusionary rule. In these circumstances, the only conceivable law enforcement justification for elimination or modification of the rule is a belief that elimination or modification would allow law enforcement officers to be more effective because they would feel less constrained by the substantive inhibitions of the Fourth Amendment. There is indeed evidence that this would be precisely the effect of eliminating or modifying the rule. (Pp. 14-15, infra.) But we assume that proponents of S. 101 and S. 751 would not embrace that justification. They do not profess to want to weaken substantive Fourth Amendment safeguards. If they did, the forthright way to go about it would be to propose to amend the Fourth Amendment so as, for example, to delete the probable cause requirement for issuing

a warrant. There is little doubt that any such weakening of substantive Fourth Amendment guarantees, if forthrightly presented, would be wholly unacceptable to the American people.

I. The Exclusionary Rule Is Required by the Fourth Amendment to the United States Constitution

A. The Supreme Court Has Held that the Exclusionary Rule Is Constitutionally Required and Congress Has No Power To Overrule that Determination

The exclusionary rule was foreshadowed in Boyd v. United States, 116 U.S. 616 (1886), where the Supreme Court analogized the use of illegally obtained evidence against a defendant to compelled self-incrimination prohibited by the Fifth Amendment. In that case the defendant was charged with the illegal importation of goods. During proceedings characterized by the Supreme Court as civil in form but criminal in nature, the Government sought to show the quantity and value of the goods imported by the defendant and relied on a federal statute to obtain a court order requiring the defendant to produce his invoice for the goods. The Supreme Court held that the Fourth Amendment barred the compulsory production of the defendant's private books and papers.

The rule was definitively written into our basic law in the landmark case of Weeks v. United States, 232 U.S. 383 (1914). The Supreme Court there ordered that evidence obtained in violation of the Fourth Amendment be returned to a defendant charged with using the mails to transport lottery tickets. The Court said that, if materials obtained in violation of the Fourth Amendment could be used against the defendant, the guarantees of the Fourth Amendment "might as well be stricken from the Constitution." Id. at 393. Therefore, the failure of the lower court to return the materials illegally seized in response to the defendant's motion for their return was a violation of the constitutional rights of the accused.

For the next 35 years the rule was applied without

question in federal criminal prosecutions. Litigation turned principally not on the existence or desirability of the exclusionary rule but on the scope of the underlying Fourth Amendment guarantees. See, e.g., Harris v. United States, 331 U.S. 145 (1947); Olmstead v. United States, 277 U.S. 438 (1928); cf. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). On the other hand, those guarantees were not good against state governmental action, and so the question of a federally-dictated exclusionary rule for the states did not arise. In Wolf v. Colorado, 338 U.S. 25 (1949), however, a majority of the Court ruled that the security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, was enforceable against the states by virtue of the Fourteenth Amendment. But the Court declined to require that the exclusionary rule -- which a concurring Justice characterized as a mere federal rule of evidence, id. at 39-40 -- be applied in state prosecutions. The Court's opinion was premised, in large measure, on the assumption that other devices might be employed by the states that would be as effective as the exclusionary rule in deterring Fourth Amendment violations. Id. at 31. The Court even raised but did not purport to answer the question whether Congress has the authority to negate the application of the exclusionary rule in the federal courts or to make it binding upon the states in the exercise of its authority under Section 5 of the Fourteenth Amendment. Id. at 33.

The doctrine of Wolf v. Colorado was short-lived. In Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court overruled Wolf and extended the application of the exclusionary rule to the states. The Court found that there were no effective deterrents to Fourth Amendment violations by police and other state officers, other than the exclusionary rule.

Since Mapp v. Ohio it has been clear that the exclusionary rule is "an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the

states by the Due Process Clause" 367 U.S. at 651. In short, the rule was held to be dictated by the Fourth Amendment itself and therefore applicable to the states by operation of the Fourteenth Amendment. And this remains the law today. The Supreme Court, following Mapp, continues to require the exclusion of illegally obtained evidence in state criminal proceedings. Apart from its role as expositor of the Constitution, the Supreme Court has no power to enact evidentiary rules for the states. Accordingly, after Mapp v. Ohio, the theory advanced in Wolf that the exclusionary rule is a mere federal rule of evidence or supervisory rule imposed by the Court is no longer tenable. In plain terms, Mapp makes it apparent that the rule is a requirement imposed by the Fourth and Fourteenth Amendments.

Following Mapp, the occasions for the Court's considering the scope of the underlying Fourth Amendment guarantees have multiplied. Lines are drawn that are difficult to follow, in part because of a close division of the Court in recent years that has produced shifting majorities. See, e.g., Jimenez v. United States, No. 80-817; California v. Riegler, No. 80-1421; Bible v. Louisiana, No. 80-1080 (all filed July 2, 1981). But there is no doubt that, in a criminal prosecution where the prosecution's effort is to lay before the trier of fact as evidence of the guilt of the defendant something seized or otherwise obtained by the authorities from that defendant, the line between admissibility and exclusibility of the thing follows precisely the wavering line that defines whether the authorities have behaved constitutionally in searching for or seizing the thing.

There are, to be sure, Supreme Court decisions of the last few years in which the Court has declined to extend the rule calling for exclusion of illegally obtained evidence to situations other than the proffer of things illegally obtained as substantive evidence in a criminal trial. Neither the holdings nor the statements of the Court in any of these

cases disturb the principle set forth in Mapp v. Ohio that

"the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" 367 U.S. at 657.

One remark in one of these cases in particular has been seized upon by those who would eliminate or restrict the exclusionary rule. In United States v. Calandra, 414 U.S. 338, 348 (1974), Mr. Justice Powell, speaking for the Court, said:

"In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."

One court has drawn from this comment the unwarranted conclusion that the exclusionary rule no longer has a constitutional status. See United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980). That position cannot be sound. A "judicially created remedy" for a constitutional violation is no less a requirement of the Constitution than the basic constitutional right for which it is a remedy.

If the exclusionary rule is constitutionally required, any attempt by Congress to abridge, restrict or limit it would, of necessity, be beyond the constitutional power of Congress. Congress has no power to alter the commands of the Bill of Rights in their direct application to the federal government. So far as the states are concerned, it has the power, under Section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of" that amendment. But even there the power is to "enforce" and not to restrict or limit. The leading case is Katzbach v. Morgan, 384 U.S. 641 (1966), where the Court stated:

"Contrary to the suggestion of the dissent, . . . § 5 does not grant Congress power to exercise discretion in the other direction and to enact 'statutes so as in effect to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants no power to restrict, abrogate or dilute these guarantees." Id. at 651, n.10 (emphasis added).

In short, as long as Mapp v. Ohio stands -- as it

indisputably still does -- Congress may not act to restrict, abrogate or dilute the exclusionary rule.

B. S. 101 and S. 751 are Fundamentally Inconsistent With the Basic Rationales Upon Which the Exclusionary Rule Is Based

As just demonstrated, the logic of the course of the decisions of the Supreme Court construing and applying the Fourth Amendment compels the conclusion that the exclusionary rule is a constitutional requirement. The constitutional nature of the rule is confirmed by a consideration of the various rationales for it. Three such rationales are evident from a reading of the cases: (1) a "personal rights" rationale, (2) a "judicial integrity" rationale, and (3) a "deterrence" rationale.

1. Personal rights. We have quoted (p. 4, *supra*) from a passage of Weeks v. United States, 232 U.S. 383 (1914), that is the first and still the best exposition of the exclusionary rule as necessary to protect personal rights. In full the passage reads:

"If letters and private documents can thus be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against . . . [unreasonable] searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393.

The statement bears paraphrasing for emphasis. The Supreme Court in 1914 thought that to permit introduction of illegally obtained evidence in a criminal proceeding would be tantamount to nullifying the right of the citizen accused of crime to be secure against unreasonable searches and seizures. That theme was, understandably, muted -- ignored, indeed -- when the Court decided Wolf v. Colorado. But it emerged again in Mapp v. Ohio. The Court quoted the passage we have just quoted, adding to it Justice Holmes' remark for the Court in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), that

without the exclusionary rule the Fourth Amendment would be a mere "form of words." 367 U.S. at 648.

The "personal right" rationale has no doubt been clouded by the Supreme Court's opinion in United States v. Calandra, 414 U.S. 338 (1974), from which we have quoted above (p. 8), and other cases such as Stone v. Powell, 428 U.S. 465 (1976). It was in explaining the Court's declination to extend the exclusionary rule so far as to forbid the questioning of a grand jury witness on the basis of documents illegally seized from him that the Court in Calandra remarked that the exclusionary rule is not "a personal constitutional right of the party aggrieved" but "a judicially created remedy designed to safeguard Fourth Amendment rights through its deterrent effect." Id. at 348. The formula has been repeated in other contexts. It seems to mean that there is no constitutional right to have illegally obtained evidence excluded from consideration at all stages of all proceedings in which the victim of the illegal search or seizure is interested. But the right of that victim to have the fruit of such a search or seizure excluded from a criminal proceeding in which he is the defendant has not been affected.

2. Judicial Integrity. In Weeks v. United States, the Court also sounded the theme of the need to maintain the integrity of the courts by refusing to participate in convicting people on the basis of unlawful seizures.

"The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U.S. at 392.

The theme was echoed and even amplified in Mapp v. Ohio, after having been ignored in Wolf. 367 U.S. at 648, 659-60.

Justice Clark said that the Court's decision gave "to the courts that judicial integrity so necessary in the true administration of justice." Id. at 660.

The judicial integrity rationale, like the personal rights rationale, has been denigrated in some recent Supreme Court opinions. See, e.g., Stone v. Powell, 428 U.S. 465 (1976). It retains at least some of its vitality, however, having been restated in one recent case, United States v. Janis, 428 U.S. 433, 458-59 n.35 (1976), thus:

"The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution The focus therefore must be on the question whether the admission of the evidence encourages violations of the Fourth Amendment rights [T]his inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." See also Dunaway v. New York, 442 U.S. 200, 218 (1979) ("integrity of the courts" mentioned along with deterrence as rationale for exclusion).

That is perhaps a grudging acknowledgment but acknowledgment it is of the proposition that "the courts must not commit or encourage violations of the Constitution."

3. Deterrence. As indicated by the quotations from Janis and from Calandra, the favored modern rationale for the exclusionary rule is that it operates to deter substantive Fourth Amendment violations.

The concept of the exclusionary rule as a deterrent was introduced in Wolf v. Colorado, where the Court said that, though "the exclusion of evidence may be an effective way of deterring unreasonable searches," it could not conclude that other methods would not be equally as effective. 338 U.S. at 31. The decision in Mapp to overrule Wolf was seemingly induced in major part by a belief on the part of the Court that "other remedies have been worthless and futile." 367 U.S. at 652. And so deterrence was emphasized as the aim of the rule.

At times the deterrence rationale is stated as if it meant that the denial of a wanted conviction for lack of the fruit of an illegal search or seizure amounted to punishment

of the arresting or searching police officer and thus would deter him and his colleagues from further Fourth Amendment violations. Justice Rehnquist seemed to have this view of deterrence in mind when he wrote the Court's opinion in Michigan v. Tucker, 417 U.S. 433 (1974). He said that by the refusal to admit evidence gained as a result of conduct by particular officers that has deprived a defendant of a Fourth Amendment right "the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused." Id. at 447. But a more realistic view is that the purpose of the rule "is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960). Professor Amsterdam has felicitously expanded upon this terse statement of the Court's. He explained that the exclusionary rule "is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set" but instead deters in the way branding a television set with the social security number of the owner deters by making the set a less attractive object of larceny because of its decreased resale value in the hands of anyone except the branded owner. A television set may still be stolen,

"[b]ut at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule, on the other hand, is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 431-32 (1974).

When the deterrent rationale is so understood, it is clear that law enforcement officers would not have the same incentive to observe the requirements of the Fourth Amendment were there no such rule. To put the case in the terms used by the Court in Janis, where the Court equated judicial

integrity with deterrence, to admit the illegally seized evidence would encourage Fourth Amendment violations. Evidence of the truth of this proposition -- which seems nearly self-evident -- is found in Professor Kamisar's account of reaction to Mapp.

"The heads of several police departments . . . reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure had just been written." Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 66 (1978).

He found that one of the most common complaints of the law enforcement officials after Mapp was that the application of the exclusionary rule would require the police to change their policies with respect to searches and seizures -- in short, to observe for the first time the requirements of the Fourth Amendment.

To the extent that the exclusionary rule is regarded as a personal constitutional right of a criminal defendant to have items illegally taken from him suppressed when they are offered in evidence and returned to him, it of course is not subject to abridgment by Congress. And to the extent that the rule is grounded in the judiciary's refusal to be a party to or to encourage a constitutional violation, Congress has no power to overrule the judicial decision not to be such a party. And even if these two bases for the rule are thought to have atrophied as a result of the Supreme Court's decisions of the last several years, the remaining deterrence rationale for the rule, properly understood, is equally inconsistent with congressional action to eliminate or restrict the rule. For that rationale holds nothing less than that the exclusionary rule alone gives law enforcement officials the incentive to abide by the limitations that the Fourth Amendment places on their conduct. Only if there is such an incentive will the Fourth Amendment be honored. Professor Kamisar's police officials who equated the exclusionary rule with the substantive

constitutional proscriptions lend the most eloquent support to that proposition. If there is no exclusionary remedy, the constitutional right will not be observed and for practical purposes there is no such right.

II. The Standards Prescribed by S. 101 Would Impemissibly Curtail the Exclusionary Rule

S. 101 contemplates limiting the exclusionary rule in federal proceedings to cases in which there have been "intentional" or "substantial" violations of the Fourth Amendment. In the same vein, a special federal task force on violent crime named by the Attorney General has very recently recommended that the rule not be applicable if a police officer has acted in the reasonable good faith belief that his action conformed to the Fourth Amendment. Final Report of the Attorney General's Task Force on Violent Crime, Recommendation 40 (August 17, 1981). While individual expressions of some Justices suggest a receptivity to consideration of some such limitation of the exclusionary rule, see, e.g., United States v. Ceccolini, 435 U.S. 268, 281 (1978) (Burger, J. concurring), nothing in those expressions suggests that Congress rather than the Court itself is free to effect the limitation. And the Court as a whole has not even indicated its own inclination to alter constitutional doctrines, much less a willingness to let Congress define constitutional remedies for its benefit.

The cases that a proponent of S. 101 would cite in support of the constitutional validity of such legislation do not support it. In one line of cases, the Court has refused to apply the exclusionary rule retroactively to law enforcement conduct that occurred before the Court expanded substantive constitutional rights. See, e.g., Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). The rationale of the cases is that the deterrent function of the exclusionary rule is not furthered by application to a case in which a law enforcement officer acted properly -- not just reasonably or

in good faith but nevertheless illegally -- on the state of the law as it was when he acted.

In another set of cases, to which we have already adverted, the current Court has tailored the exclusionary rule to its deterrent function by holding that the rule is inapplicable in certain proceedings subsidiary or unrelated to federal or state criminal proceedings. See United States v. Calandra, 414 U.S. 338 (1974) (a witness testifying before a grand jury may not refuse to answer questions on the grounds that they are based upon illegally obtained evidence); United States v. Janis, 428 U.S. 433 (1976) (illegally seized evidence need not be suppressed in civil proceedings concerning taxes). In these cases, the Court determined simply that the exclusionary rule need not be applied to proceedings such as the grand jury's deliberations or federal civil proceedings in order to "remove the incentive to disregard" the strictures of the Fourth Amendment. The refusal to accept the evidence in a criminal trial accomplishes the removal.

Finally, in another line of cases the Supreme Court has declined to apply the exclusionary rule where the use made of evidence in a criminal proceeding is, on the Court's view, too remote to provide an incentive for disregarding the underlying substantive rules. See, e.g., United States v. Havens, 446 U.S. 620 (1980) (illegally seized evidence may be used to impeach cross-examination testimony growing out of defendant's direct testimony); United States v. Ceccolini, 435 U.S. 268 (1978) (causal connection between police misconduct and introduction of live witness testimony too attenuated to require exclusion of live witness testimony). In these cases also, the Supreme Court has made the judgment that the deterrence of police misconduct would not be increased by application of the exclusionary rule.^{1/}

^{1/} We do not discuss the recent Supreme Court cases on the standing requirements of the Fourth Amendment as these do not bear upon when the exclusionary rule may be applied but rather who may ask to have the rule applied. See, e.g., Rakas v. Illinois, 439 U.S. 128 (1978):

These three lines of cases -- (1) refusal to give retroactive effect to the exclusionary rule where substantive constitutional rights change, (2) refusal to extend the exclusionary rule to forums of marginal deterrent value, and (3) refusal to apply the exclusionary rule where the violation is too remote from the use to be made of the evidence -- do not support the drastic curtailment of the exclusionary rule contemplated by S. 101. They indicate rather that the Court has tailored the exclusionary rule to those circumstances where a deterrent function will be served. S. 101, by contrast, would curtail the exclusionary rule without regard to the deterrent function of the rule.

Even if one assumes that the Supreme Court would be inclined to adopt standards for the application of the exclusionary rule such as those contained in S. 101, Congress lacks the authority to do so. The Supreme Court has not adopted the standards set forth in S. 101.^{1/} The Court has not invited Congress to change existing Supreme Court doctrine along the lines of S. 101. Enactment of S. 101 would thus constitute an attempt by Congress to restrict a remedy that the Supreme Court has held to be required by the Constitution. S. 101 would also dilute this remedy by allowing the federal district courts to engage in an amorphous balancing act to determine when this remedy is to be available. In the absence of a declaration by the Supreme Court that Congress has the power, we are aware of no Constitutional authority that would allow Congress to restrict directly judicially created remedies mandated by the Constitution. We submit that enactment of S. 101 would constitute a particularly serious challenge to

1/ This much at least is transparently evident: if S. 101 were current Supreme Court law, enactment of the legislation would be entirely superfluous. It is thus entirely clear that the purpose of S. 101 is to curtail the Supreme Court's application of the exclusionary rule. Senator DeConcini said as much in the introduction of his bill: "It [S. 101] would define and limit application of the exclusionary rule in Federal Courts." 127 Cong. Rec. S 152 (daily ed. Jan. 15, 1981) (emphasis added).

the separation of powers extending far beyond the perimeters of the Fourth Amendment. As previously noted, even under Section 5 of the Fourteenth Amendment, which does give the Congress power to legislate concerning remedies for violations of constitutional rights, the Court has stated that "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." Katzbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (emphasis added).

When S. 101 was introduced, the sponsor invoked several constitutional provisions as sources of authority for congressional action.

"The Constitution vests Congress with the power to ordain and establish inferior courts, U.S. Constitution, article III, section 1; to make regulations and establish exceptions with respect to the appellate jurisdiction of the Supreme Court, U.S. Constitution, article III, section 2; and to make all laws necessary and proper for carrying into execution the powers granted the Federal Government by the Constitution, including those granted the courts, U.S. Constitution, article I, section 8. It is generally conceded that Congress has the power to establish rules for the admissibility of evidence in Federal courts. [Citations omitted]. Congress has recently exercised this authority by passage of the Federal Rules of Evidence, 88 Stat. 1929 (1975)." 127 Cong. (Rec. S 153 (daily ed. Jan. 15, 1981)).

The specific constitutional provisions that are cited seem, on their face, off the point. As for the congressional power to prescribe rules of evidence, a power that one may fairly concede though no constitutional text can be cited for it, it is enough to say, at the risk of banality, that such a power, like any other congressional power, is exercised in subordination to specific constitutional limitations, including in particular those of the Bill of Rights. That Congress may prescribe rules of evidence does not mean, for example, that it is free to make a criminal defendant a compellable witness in his own trial.

III. S. 751 Is Unconstitutional Because It Eliminates the Exclusionary Rule and Fails to Provide Any Effective Alternative Remedy

S. 751 would eliminate the exclusionary rule entirely and would instead provide a limited damages remedy against the United States and authorize disciplinary action against offending law enforcement personnel. It thus tries to take advantage of the currently popular deterrent rationale for the exclusionary rule -- and what that rationale may be taken to imply, *i.e.*, that some other remedy might be substituted that would be as good a deterrent. The effort is plausible, but it fails. It fails for several reasons.

First, it ignores the fact that considerations other than deterrence have been thought and, to some extent at least, are still thought to underlie the exclusionary rule. Even if the Supreme Court has so far denigrated the idea that a defendant in a criminal case has a constitutional right not to suffer the admission of evidence illegally seized from him that it may be disregarded -- a proposition that is by no means apparent from the cases -- the Court clearly has not abrogated the doctrine that it and the lower federal courts will not be made parties to constitutional violations by allowing unconstitutionally seized evidence to be introduced into criminal trials. (Pp. 11-12, *supra*.) The explicit provision of a damages remedy does not affect either the personal rights or the judicial integrity reasons for excluding illegally seized items from criminal trials.

Second, the damages remedy (and the remedy of discipline for misbehaving police officers) are surely the most obvious of the remedies the Court recognized as "worthless and futile" in Mapp v. Ohio, 367 U.S. 643, 652 (1961). The Court there recited the experience of California, whose highest court had found that "other remedies have completely failed to secure compliance with the constitutional provisions" and therefore adopted the exclusionary rule, *id.* at 651, and then went on:

"The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of ~~relegating the Fourth Amendment to the~~ protection of other remedies has, moreover, been recognized by this Court since Wolf." Id. at 652.

The Court might conceivably be persuaded some day that the majority in Mapp was wrong when they spoke of the "obvious futility" of relying on any remedy other than exclusion. The mere explicit provision by Congress of remedies of the very sort that were thus found wanting 20 years ago is not persuasive by itself that the Court should or would reconsider the rule of constitutional law to which it was led, in very considerable part, by its finding that it was futile to depend on such remedies.

Third, any damages remedy is in fact demonstrably inadequate as a deterrent of violations of the Fourth Amendment and, as limited by S. 101, the damages remedy would not approach being adequate. The authorization of disciplinary action adds little or nothing to what we assume is already the law and so cannot conceivably be regarded as an adequate substitute for the exclusionary rule. We expand on this third point below.

A. The Inadequacy of the S. 751 Damage Remedy

We first discuss the problems intrinsic to any damage remedy for Fourth Amendment violations and then highlight those aspects of the S. 751 damage remedy that make it particularly inadequate.

Any damages remedy for Fourth Amendment violations is bound to be ineffective because of the difficulty of valuing the impairment of the interests the Fourth Amendment is designed to protect. The actual damages that could most easily be calculated are those for physical injuries to person and property flowing from a Fourth Amendment violation. But many searches and seizures clearly prohibited by the Fourth Amendment do not result in bodily injury or destruction of or damage to property. What are the damages to be awarded where a police officer without probable cause, very politely

and courteously, proceeds to scrutinize the contents of a briefcase or purse and finds nothing compromising? Absent reasonable or probable cause, such conduct by the law enforcement officer would be in violation of the Fourth Amendment, yet it is hard to conceive of any practical way to calculate damages for such invasions of the right of privacy. How is a jury supposed to put a dollar figure on such an intangible as invasion of privacy? Perhaps the answer is clear: where the police officer has conducted himself so politely and courteously, no damage is suffered. But if this is the case, then in most cases involving violations of the Fourth Amendment, no damages will be awarded simply because police officers only rarely injure people or damage or destroy property wantonly in the execution of their duties.

The Fourth Amendment does not limit its protection to security from physical invasions of body and property by law enforcement officers or even principally concern itself with such physical harms. On the contrary, the Fourth Amendment speaks of "the right of the people to be secure in their persons, houses, papers and effects." It is quite clear that this emphasis on "the right of the people to be secure" defines a right of privacy that is substantially broader than the bare right to have one's person and possessions left intact. The fact that it is hard to put a dollar figure on what privacy is worth does not mean that privacy is worth nothing. And a damages remedy that does not compensate for invasions of privacy apart from physical injury to body or property will be ineffective in deterring police misconduct that impinges upon the interest in privacy.

Thus, in the absence of extreme police misconduct there is good reason to suppose that the damage awards in most cases would be minimal and, thus, of minimal deterrent value. And, of course, because damage awards would be small, the incentive to sue would also be minimal, thus further reducing the deterrent value of the damages remedy.

There are other reasons why few damage actions are likely to be brought. Many of those who would be most likely to bring such actions live, at best, in uneasy accommodation with the enforcement officers whom they would be accusing of wrongdoing in any such action. Moreover, if convicted and imprisoned, the prospective Fourth Amendment plaintiff would be in the hands of the authorities -- if not those who violated his rights, then, certainly in the view of the convict, their close colleagues. There is bound to be fear of reprisal. See Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, [1975] Wash. U. L. Q. 621, 692 (1975). Additionally it seems likely that many claimants would be subject to pressures to waive their right to damages in the plea bargaining process.

Professor Amsterdam has described the institutional disincentives for an accused party to pursue a damage remedy against law enforcement officers:

"Where are the lawyers going to come from to handle these cases for the plaintiffs? *Gideon v. Wainwright* and its progeny conscript them to file suppression motions; but what on earth would possess a lawyer to file a claim for damages before the special tribunal in an ordinary search-and-seizure case? The prospect of a share in the substantial damages to be expected? The chance to earn a reputation as a police-hating lawyer, so that he can no longer count on straight testimony concerning the length of skid marks in his personal injury cases? The gratitude of his client when his filing of the claim causes the prosecutor to refuse a lesser-included-offense plea or to charge priors or to pile on 'cover' charges? The opportunity to represent his client without fee in these resulting criminal matters?" Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974).

The institutional obstacles to suit under a damage remedy such as S. 751 are not limited to those accused of crimes. Some of the more severe disincentives to sue for violations of the Fourth Amendment are common to both suspects and wholly innocent citizens. Thus, a jury is very unlikely to make a significant damage award to police misconduct victims

who are in fact (or by virtue of their position as plaintiffs merely appear to be) criminal suspects. The sympathies of the jury will most likely lie with the law enforcement officers, who were after all engaged in doing their job.

"A defendant policeman in a section 1983 action may benefit from the image of authority and respectability evoked by his office On the other hand, the plaintiff's reputation, if not already sullied by a criminal record, may be called into question simply because the case arises from a confrontation with the police. Finally, juries may be prejudiced against some plaintiffs because of their race or unconventional lifestyles." Project, Suing the Police in Federal Court, 88 Yale L. J. 781, 783-84 (1979).

There is no doubt that in this type of litigation, the defendant would seek to introduce evidence of the crimes on account of which the plaintiff was searched and his property seized. No doubt the defendant would seek to introduce evidence of suspicious or unorthodox behavior by the plaintiff. And, indeed, under a damage remedy these would be legitimate issues, as they are relevant to the issue of whether the law enforcement officers had probable cause to conduct the search or seizure. The jury would thus most likely conclude that the plaintiff is a rather unsympathetic sort seeking to harass those charged with crime control. ^{1/} And, as noted by Professor Amsterdam and others,

^{1/} As stated by one commentator:

"The reasons why the victim of the unconstitutional search and seizure so often loses his suit while the defendant-policeman prevails are numerous. The first and most important reason is that the claimant who has been charged with or convicted of crimes is not likely to evoke the jury's sympathy, particularly after the defendant-policeman explains that he was only trying to protect society. Even if the claimant has not been criminally charged, he will not be a sympathetic figure to the average jury if, as most victims of police illegality, he is part of America's lower class. Second, the jury bias in favor of a policeman often allows the policeman successfully to lie his way to victory by fabricating a story of adherence to constitutional requirements during the search and seizure." Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, [1975] Wash. U. L. Q. 621, 692-93 (1975).

the plaintiff would be up against a team of professional investigators and testifiers, making the practical obstacles to recovery all but insuperable.^{1/}

The specific damages provisions of S. 751 exacerbate these inherent difficulties with the damages remedy. Most egregiously, the damages that may be recovered are limited to those for "actual physical personal and . . . actual property damage." Thus, by its very terms S. 751 precludes damage awards for impairment of the principal interest protected by the Fourth Amendment -- the interest in privacy.

Given this limitation on the type of damages that may be recovered, indeed, S. 751 scarcely expands existing rights of citizens to be compensated by the United States for abusive practices of its law enforcement officers. Under the Federal Tort Claims Act, one can already sue the United States for assault, battery, false imprisonment, false arrest, and other common law torts resulting in injury to body or property. See 28 U.S.C. §§ 2674 and 2680; Norton v. United States, 581 F.2d 390 (4th Cir.), cert. denied, 439 U.S. 1003 (1978). The only expansion in the availability of damage awards provided by S. 751 is to that segment of cases in which serious injury has been inflicted on a person's body or property in violation of the Fourth Amendment but in a manner that did not

^{1/} In Professor Amsterdam's words:

"Police cases are an unadulterated investigative and litigative nightmare. Taking on the police in any tribunal involves a commitment to the most frustrating and thankless legal work I know. And the idea that an unrepresented, inarticulate, prosecution-vulnerable citizen can make a case against a team of professional investigators and testifiers in any tribunal beggars belief. Even in a tribunal having recognized responsibilities and some resources to conduct independent investigation, a plaintiff without assiduous counsel devoted to developing his side of the case would be utterly outmastered by the police. No, I think we shall have airings of police searches and seizures on suppression motions or not at all." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 430 (1974).

involve any recognized intentional or negligent tort of a law enforcement officer. There may be such cases, but it is not easy to hypothesize their facts.

S. 751 exacerbates the problems that are inherent in any damages remedy by capping the permissible award at \$25,000 for actual and punitive damages combined. The \$25,000 ceiling would deter suit. Twenty-five thousand dollars is not a lot of money for which to gamble the kind of costs (and attorney fees unless the case were taken on a contingent basis) that are associated with suits against the United States in federal court and that would presumably be borne by the plaintiff if he lost.

While S. 751 permits the court to award claimants attorney's fees, and thus superficially appears to provide incentives for lawyers to represent claimants, these incentives are negligible. Under 28 U.S.C. § 2678, which is expressly applicable to damage claims under S. 751, an attorney may not charge his or her client more than 25 percent of any judgment rendered or more than 20 percent of any settlement. This percentage limit on attorney's fees means that the absolute maximum an attorney may charge is \$6,250 in a judgment and \$5,000 in a settlement. As damage awards under S. 751 in the vast majority of cases are likely to be below the \$25,000 ceiling,^{1/} it is clear that many claimants (who are likely to be poor) would have grave difficulties securing the services of able counsel.

B. The Disciplinary Remedy

S. 751 contains a section that provides:

"An investigative or law enforcement officer who conducts a search or seizure in violation of the United States Constitution shall be subject to appropriate discipline in the discretion of the Federal agency employing such officer, if that agency determines, after notice and hearing, that the officer conducted such search or seizure lacking a good faith belief that such search or seizure was constitutional."

^{1/} One study indicates that the average award in Fourth Amendment suits brought under 42 U.S.C. § 1983 was \$5,723. Project, Suing the Police in Federal Court, 88 Yale L. J. 781, 789 (1979).

This provision in effect vests discretion in the federal agencies to discipline personnel who commit violations of the Fourth Amendment. To our knowledge, the federal agencies already have such discretion and thus this provision authorizing disciplinary measures adds nothing new.

IV. The Standards Prescribed By S. 101 Are Inequitable, Unadministrable and Would Undermine the Deterrent Function of the Rule

When the inadequacy of the proffered substitute remedies of S. 751 is laid bare, all that need be said has been said, both as a matter of constitutional law and as a matter of policy. The inadequacy of the S. 751 remedies demonstrates that the bill does not pass constitutional muster and that, in addition, there are the soundest of policy reasons for not enacting it.

Concerning S. 101 a few additional words are appropriate. For even if the question of its constitutionality were closer than it is, there would be independent reasons for not enacting it.

Adoption of the standard set forth in S. 101 -- i.e., the requirement that there be a "substantial" or "intentional" violation of the Fourth Amendment if the exclusionary rule is to be applied -- would preclude application of the rule to cases where the invasion of Fourth Amendment rights, although not intentional, was reckless, grossly negligent, or negligent unless it was "substantial."^{1/} As "intentional" and "substantial" violations of the Fourth Amendment are alternative thresholds for application of the rule under S. 101, we shall first address the two standards separately.

^{1/} A "substantial" violation is further defined in S. 101 by a four-prong test that includes consideration of whether the violation was "reckless." Recklessness is generally considered in criminal and tort law a lower threshold of intentionality than "intentional." Because "recklessness" is but one prong of a four prong test defining substantial, it is evident that some "reckless" violations of the Fourth Amendment may ultimately be deemed not "substantial" and therefore in those cases S. 101 will preclude application of the exclusionary rule.

A. The Intentional and Substantial Standards of S. 101 Are Not Calculated to Further the Purpose of Preventing Fourth Amendment Violations

Proponents of S. 101 probably mean to reserve the term of "intentional violation" for those cases where law enforcement officers intend to conduct a search and seizure in violation of the Fourth Amendment or where the search and seizure is based on erroneous and unreasonable factual premises. This meaning of the term "intentional violation" would, under S. 101, severely curtail the exclusionary rule and (not surprisingly) finds no support in the decisions of the Supreme Court.

Restriction of the exclusionary rule to those violations that are a product of a conscious desire to ignore the Fourth Amendment would seriously undermine the deterrent function of the rule. It would remove the incentive of law enforcement officers to educate themselves in Fourth Amendment jurisprudence. It would encourage them to make warrantless searches where they believed that a warrant might be required but were not sure.

There is no doubt that negligent, grossly negligent and reckless violations of the Fourth Amendment can be deterred and that the exclusionary rule can serve its deterrent function in these cases as well as in cases of intentional violations. Faulty though his comprehension of the nature of the deterrent function of the rule may be (p. 13, supra), Justice Rehnquist understood this much when he wrote in Michigan v. Tucker, 417 U.S. 433, 447 (1974), that "the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."

To preclude application of the exclusionary rule where the violation is not intentional is to place a premium on a law enforcement officer's ignorance of the Constitution. In effect, then, S. 101 would reward a law enforcement officer's

ignorance of the Constitution by precluding application of the exclusionary rule where a nonsubstantial violation is not intentional.^{1/} S. 101 would implicitly encourage negligent and reckless police conduct in arrest, search and seizure.

Like the "intentional" standard, S. 751's alternative threshold of "substantial" violation is also seriously deficient in its protection of Fourth Amendment rights. S. 101 states:

"In determining whether a violation is substantial for the purposes of this section, the court shall consider all of the circumstances, including--

- (1) the extent to which the violation was reckless,
- (2) the extent to which privacy was invaded;
- (3) the extent to which exclusion will tend to prevent such violations; and
- (4) whether, but for the violation, the things seized would have been discovered; or whether the relationship between the things discovered and the violation is attenuated."

1/ As noted by Professor Kaplan (who is by no means a friend of the exclusionary rule) in connection with a proposed "inadvertence" exception to the exclusionary rule:

"There are, however, basic problems with such a modification of the rule. It would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Nor would it suffice further to modify the rule and require that the police error be reasonable as well as inadvertent. While such a standard would motivate a police department to insure that its officers made only reasonable mistakes, it is hard to determine what constitutes a reasonable mistake of law. Moreover, the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1044 (1974).

Presumably, this four-part test requires the court to balance each of the four factors in determining whether the violation is substantial and thus whether the exclusionary rule ought to apply. The most striking feature of the "substantial violation" standard (and perhaps its most radical departure from existing Supreme Court doctrine) lies in the fact that it would delegate a whole series of highly speculative factual inquiries to the lower federal courts.^{1/} Deciding whether a violation was reckless, deciding to what extent privacy has been invaded, deciding to what extent exclusion would prevent such violations and deciding whether "but for" the violation the things seized would have been discovered each is a highly speculative metaphysical inquiry. Quite apart from the fact that the Supreme Court has not adopted the standards set forth in S. 101, it has neither delegated authority to nor required the lower federal courts to make such fact-oriented inquiries, and we doubt that it would ever do so. The "substantial violation" standard of S. 101 vests almost complete discretion in the lower federal courts to make factual decisions on each of the four factors. The "substantial" violation standard even fails to specify the thresholds for each of the four considerations. For instance, in ruling upon the admissibility of evidence does a substantial invasion of privacy counsel exclusion? A direct invasion of privacy? A serious invasion of privacy? A perceptible invasion of privacy? One can ask the same questions about the degree of recklessness required to counsel exclusion under S. 101.

In addition, S. 101 fails to establish who has the burden of proving the (indeterminate) levels for each of the four factors. Moreover, the substantial violation standard

^{1/} The high incidence of uncertainty and speculation in the standards set forth in S. 101 is no accident. S. 881, 93d Cong., 1st Sess. (1973), which was a precursor to S. 101 and which contained a similar "substantial" violation threshold for application of the exclusionary rule, was explicitly designed to give the courts greater latitude in decisions on admissibility of evidence.

vests almost complete discretion in each federal district judge to decide what weights to assign to each of the four prongs. In addition, as the four considerations are hardly fungible, it is not readily apparent how a court should perform the balancing of all four considerations. How does one balance an indeterminate level of recklessness against an undefined degree of invasion of privacy? In its broad grant of authority to the lower federal courts, the "substantial" violation standard leaves each federal district judge free to consider "all of the circumstances." We submit that enactment of the "substantial" violation standard would result in a broad spectrum of differing views on the scope of the exclusionary rule; it certainly would not result in anything close to a recognizable rule of law.

B. S. 101 Would Impair the Efficient Administration of Justice

Quite apart from the fact that the "intentional" and "substantial" violations standard of S. 101 is unintelligible and incapable of being applied in any manner that would even remotely resemble a rule of law, S. 101 would have harmful effects upon the efficient administration of justice. S. 101 would require complicated factual inquiries at suppression hearings. It would require an investigation of the officer's state of mind to determine whether a violation was intentional or reckless. It would require a factual inquiry into the extent to which privacy was invaded. Indeed, S. 101 offers the worst of all possible worlds in terms of judicial administration. First, it would require the courts to disregard 80 years of precedent on the exclusionary rule and to start defining the scope of the rule from scratch. The imponderable factual inquiries required by S. 101 would compound congestion and delay problems in the courts. Massive litigation would result as defense attorneys sought to exclude evidence under S. 101. Ironically, the appellate courts would not be able to provide much guidance to the lower courts because S. 101

prescribes an extremely fact-oriented standard, and the authority of the appellate courts extends only to declaring decisions to admit evidence clearly erroneous as a matter of law. The inability of the appellate courts to give guidance to the lower federal courts on the interpretation of S. 101 would increase litigation simply because the uncertainties contained in S. 101 will not be dispelled for many years.

Furthermore, S. 101 would direct judicial inquiry away from the substantive requirements of the Fourth Amendment, away from adjudication of the guilt or innocence of the suspect and towards an investigation of the law enforcement officer's state of mind. As a result, the courts would be burdened with yet another fact-finding duty. And the difficulties that the courts would face in resolving the relevant factual issue would be imposing, if not insuperable.^{1/} For example, there

^{1/} As stated by Professor Kaplan:

"There is a more serious problem with exempting searches made through inadvertent errors of law from the exclusionary rule. To do so would add one more factfinding operation, and an especially difficult one to administer, to those already required of a lower judiciary which, to be frank, has hardly been very trustworthy in this area. It is difficult enough to administer the current exclusionary rule, since police perjury can, and often does, prevent accurate findings of fact. So long as lower court trial judges remain opposed on principle to the sanction they are supposed to be enforcing, the addition of another especially subjective factual determination will constitute almost an open invitation to nullification at the trial court level. In order to suppress evidence, the trial judge would have to find evidence of the officer's state of mind which would be generally difficult to come by apart from the officer's self-serving and generally uncontradicted testimony. And since the necessary finding requires proof that a policeman actually has engaged in a criminal act, the defendant's burden of proof would be increased, as a psychological or perhaps even as a legal matter." Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1045 (1974).

is no doubt that S. 101 would increase fabrication by law enforcement officers seeking to secure the admission of evidence. What law enforcement officer is likely to give testimony indicating that his invasion of an individual's Fourth Amendment rights was intentional or reckless?

CONCLUSION

Over the years, the exclusionary rule has been subject to criticism by law enforcement officers and by some judges and commentators. S. 101 and S. 751 represent attempts to repair some of the asserted shortcomings of the rule. If enacted, however, neither would repair any such shortcoming, but instead both would strip the exclusionary rule of the value it now has as deterrent and as guardian of constitutional rights and judicial integrity. The exclusionary rule as it stands now is a fairly simple rule to apply. It is readily understandable to police officers and judges. Many of the criticisms leveled at the exclusionary rule concern not the rule but the substantive commands of the Fourth Amendment as these have been interpreted by the Supreme Court.

"As Senator Robert Wagner pointed out in the 1938 New York State Constitution Convention 'All the arguments [that the exclusionary rule will handicap law enforcement] seem to me to be properly directed not against the exclusionary rule but against the substantive guarantee itself . . . It is the [law of search and seizure], not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.

It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform.'" Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 67, 73 (1978).

There are those who claim that the exclusionary rule prevents the courts from bringing criminals to justice.

Factually, that seems not to be the case in any significant sense. (Pp. 1-3, supra.) Moreover, it is not the exclusionary rule that creates whatever obstacles there are to full enforcement of the criminal law; it is the Fourth Amendment itself -- a constitutional provision that quite consciously makes the work of law enforcement officers more difficult in order that all of us may be free from unreasonable searches and seizures.

COVINGTON & BURLING

Senator SPECTER. I have been left with the authority to adjourn these hearings, which I now do. Thank you very much.

THE EXCLUSIONARY RULE BILLS

TUESDAY, MARCH 16, 1982

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, commencing at 2:10 p.m., Senator Dennis DeConcini presiding.

Also present: Senator Grassley.

OPENING STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DeCONCINI. The Senate Subcommittee on Criminal Law will come to order.

We are here to continue the third day of hearings on S. 101, S. 751, and the relevant portions of S. 1995, relating to the exclusionary rule.

Senator Mathias was required to be absent as a result of another matter of a very pressing nature. And at this time I will include in the record his opening remarks.

[The prepared statement of Senator Mathias follows:]

PREPARED STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Today the Senate Subcommittee on Criminal Law begins its third day of hearings on legislative proposals that would limit or abolish the Fourth Amendment Exclusionary Rule in federal prosecutions.

The three specific proposals before us are S. 101, Senator DeConcini's proposal to limit the exclusionary rule to cases where the Fourth Amendment violation complained of was willful or substantial; S. 751, which was introduced by Senators Thurmond and Hatch and would abolish the rule entirely and replace it with a civil damage remedy; and S. 1995, Senator Dole's omnibus anti-crime bill which contains a proposal that would limit the rule to intentional, bad faith violations of the Fourth Amendment and would provide a civil damages remedy for such violations.

To date, the Subcommittee has heard a variety of views on the wisdom and constitutionality of such legislation. On one end of the spectrum, the American Bar Association, the American Civil Liberties Union, and Stephen Sachs, a former United States Attorney for the District of Maryland and the current Attorney General of Maryland, have all advocated retention of the rule in its present form. On the other end of the spectrum, representatives of a crime victims organization, a private citizens association and Steven Schlesinger, a political scientist who has written extensively on the exclusionary rule, have all testified in support of abolition of the rule.

The Administration has taken a middle road, and, has recommended adoption of a good faith exception to the exclusionary rule along the lines suggested by the Attorney General's Task Force on Violent Crime. Just last week the Department of Justice followed up its testimony before the Subcommittee by sending to Congress a draft bill to incorporate a good faith exception to the exclusionary rule into the federal criminal code.

As the debate on these bills continues today we will have the benefit of the views of a number of witnesses who have had a great deal of experience with the practical

application of the exclusionary rule. Our first witness will be a panel consisting of representatives of the Americans for Effective Law Enforcement, Inc., and National Association of Attorneys General.

Senator DeCONCINI. We will have some time constraints, unfortunately, today because of the schedules and getting other Senators to hear these.

So, the first panel, if I could please ask the Honorable Jim Smith, attorney general, State of Florida, to come forward, and be joined with Mr. Wayne Schmidt, executive director of Americans for Effective Law Enforcement.

Gentlemen, thank you for being here. If you have completed statements we will put them in the record. We would ask that you keep your oral testimony to 10 minutes each, if you can.

Mr. Smith, thank you for coming the distance. Though the time restraint may seem very short to you, your testimony is very important in this subject matter that is before this subcommittee.

STATEMENT OF A PANEL CONSISTING OF JIM SMITH, ATTORNEY GENERAL, STATE OF FLORIDA, NATIONAL ASSOCIATION OF STATE ATTORNEYS GENERAL, AND WAYNE SCHMIDT, EXECUTIVE DIRECTOR, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT

Mr. SMITH. Thank you, Mr. Chairman.

I am delighted to be here today and pleased to speak in behalf of the National Association of Attorneys General on this important legislation.

During its 1981 midwinter meeting, the association adopted a resolution in support of legislation that would allow introduction of evidence obtained in the course of a reasonable, good-faith search.

The premise of that resolution is that the exclusionary rule, as it has evolved in judicial practice, no longer serves its fundamental and legitimate purpose, which is to deter illegal police conduct.

Today we find the rule employed not as a test of fourth amendment reasonableness, but of the absolute perfection of the investigative procedure followed by law enforcement officers in the field, frequently under trying conditions.

In the judicial interpretations that created the exclusionary rule, the Constitution has been amended to impose standards that exceed the test of reasonableness.

The search for truth, which is fundamental to our system of justice, is actually being frustrated by a rule intended to compel respect for the rule of law.

I suggest this is a perverse and grim irony imposed on a nation that is reeling from the impact of crime.

I am sure the committee has been given numerous examples in which the attention of the court was diverted from the question of guilt or innocence to the technical details of search.

Society protects defendants by providing that they cannot be convicted and punished without proof of intent to violate the law.

Yet in following the exclusionary rule we label police conduct illegal and punish society without any regard for the intent of the police officer.

The National Association of Attorneys General would urge the Congress to modify the rule legislatively to incorporate a good-faith test of admissibility.

Senate bill 1995 provides definitive standards for determining whether evidence improperly seized may or may not be admissible. I particularly commend the standard requiring any violation of the defendant's rights to have resulted in actual prejudice to such defendant.

This would be a significant step toward restoring reality and rationality to the law of search and seizure; applying the concept of proportionality.

Too often the rule leads to the suppression of factual evidence of guilt, requiring our courts to set aside their duty to see that the truth is brought out.

Because of its specific standards, Senate bill 1995 would, in my opinion, be the best choice for congressional enactment. I believe it could be improved by language making the tort remedy it provides the exclusive remedy for violation of constitutional rights.

My second choice would be Senate bill 751. It has the advantage of being easy to administer and contains sanctions to deter illegal police conduct.

I would also find Senate bill 101 acceptable as a remedy for the serious detriment to justice under the law that has arisen through use of the rule.

Mr. Chairman, the States are looking to the Federal Government to make this change in the exclusionary rule because of *Mapp v. Ohio*.

I would be remiss if I did not point out that these much needed reforms deal only with Federal criminal trials and do not speak to the problems experienced by the States.

The Congress should make it clear that no Federal court should order the exclusion of evidence or declare a State court judgment and sentence invalid if the evidence would have been admissible in a Federal district court.

There should not be one set of rules governing State courts and another governing Federal courts. Indeed, the U.S. Supreme Court itself has rejected such a notion in the case of *Kaufman v. United States*.

Also, the limitations on civil liability against the Federal Government for any violation of fourth amendment rights by Federal agencies should be extended to the States.

There has never been an absolute protection from illegal searches. If this was so, the U.S. Supreme Court would prevent use of illegally seized evidence in all proceedings against all persons, which it does not.

Furthermore, I think it should be emphasized that we only require judges to conduct fair trials, not perfect trials. Every trial has some degree of error in it.

How can we then require perfection from law enforcement officers in conducting searches?

We tell them they have to do their job perfectly. And too often that is just not practical or reasonable.

I submit that we are not so meticulous in adhering to the fourth amendment.

We might ask: Where is the fourth amendment and where is probable cause when the briefcase of an attorney, who is an officer of the court, is searched before entering the U.S. Supreme Court in Washington or in the Nation's Capitol?

Where is the fourth amendment when luggage is being searched before passengers can board an airplane?

Are the rights of ordinary citizens less than those that we afford criminal defendants?

Shouldn't police officers have as much right, acting responsibly, to protect public safety on the streets as they do in airline terminals or government buildings?

The supposition is that law-abiding citizens prefer the search to the hazard. This same justification applies to what we propose here today.

We submit that the price of excluding evidence seized in good faith, without knowledge of its illegality, is too high a price for a society of laws to pay.

I would like to quote from a well-reasoned dissent in a search and seizure case by the Honorable J. Truett Ott, judge of Florida's Second District Court of Appeals.

There is no such thing as absolute freedom in today's complex society. Every reasonable person expects to sacrifice a measure of his personal freedom, not only that his neighbor enjoy equal rights, but for his own benefit and protection.

It is unrealistic to exclude that spirit of compromise from the rules governing our law enforcement agencies.

I would like to attach the dissent in that opinion to my statement, Mr. Chairman, and I will be happy to answer any questions you might have.

Senator DeCONCINI. Thank you.

Mr. Schmidt.

Mr. SCHMIDT. Thank you.

My name is Wayne Schmidt and I represent Americans for Effective Law Enforcement, which is a not-for-profit educational organization headquartered in California.

In the last dozen years we have filed over 40 amicus curiae or "friend of the court" briefs with the U.S. Supreme Court.

Senator, I have a prepared statement that is brief, and I would like to have that put into the record.

Senator DeCONCINI. Without objection, it will be inserted in the record.

Mr. SCHMIDT. Thank you.

In the interest of brevity, I would just point out that my organization strongly supports legislative or court modification of the exclusionary rule and specifically urges the "good faith exception" which was adopted in the fifth circuit in the *Williams* case.

We would also suggest that some specific language be enacted to guide the courts in determining what is or what is not "good faith."

The vast majority of arrests or searches are going to be without a warrant. Consequently, the Attorney General's task force—which suggests that there be a presumption of good faith when an officer has obtained an arrest warrant or a search warrant—is not going to apply in most of the cases.

I notice since *Terry v. Ohio* was decided that there has been over 5,321 published court opinions determining what is or what is not a "reasonable suspicion." A reasonable suspicion is a standard just below probable cause. If it would be possible to define good faith of a law enforcement officer in terms of reasonable suspicion as a bottom standard, there would be thousands of decisions which could guide the courts in determining whether or not the officer had acted in good faith.

Language such as, for example:

Whenever a law enforcement officer conducts a search without a search warrant, there is a presumption that the officer has acted in good faith when:

(a) The officer reasonably believed that he possessed probable cause to make the search, and

(b) The officer, in fact, possessed only a reasonable suspicion that the person or premises searched possessed or contained items of an evidentiary nature, and

(c) The officer reasonably believed that there were circumstances excusing the procurement of a search warrant.

I would also like to add that I have been in contact with the U.S. attorneys in Houston, Mobile and Miami. I asked them about the effect of the *Williams* decision in their particular districts.

In that 18-month period ending in November and December of last year the prosecutors in those offices informed me that they were totally unaware of any abuse or attempted abuse of the "good faith exception" in the 5th circuit and now the 11th circuit.

I would also like to point out that Houston averages 1,185 criminal filings a year; Miami 602; Mobile 119. So, there has obviously been close to 2,000 criminal filings just in those three districts and not a single instance of alleged abuse has been reported.

Thank you. And I will be happy to answer and respond to any questions.

Senator DECONCINI. Thank you.

Mr. Smith, Attorney General Smith, in your part of the country—somewhat similar from where I come from, the State of Arizona—as to the inundation of contraband, in particular drugs coming into our Nation through our respective States, do you believe any consideration ought to be given to going even further than 1995 or 101 as it relates to drug cases solely?

Mr. SMITH. Doing that might raise equal protection questions.

Mr. Chairman, I think that going as far as 1995 does or the other legislation that is being considered at this point in time is far enough. I think that will go a long way toward solving our losing major drug cases in Florida, and I am sure they do in Arizona, at motion to suppress hearings. And that is when you lose the major case. And it is a very, very significant problem in our State.

As I said, I like the protections frankly that are afforded defendants under 1995. I think that will give us the extra measure of law enforcement that we need to begin to get the attention of some of these drug dealers.

Senator DECONCINI. Do you think if Congress did enact such legislation—1995 or 101—based on a good faith standard, is it your belief, Mr. Smith, that the States would adopt some similar legislation; that this would be kind of go signal or the leading effort; and that that is one of the reasons the States have not done so?

Mr. SMITH. I think the States feel like, you know—with the *Weeks* case, and as it is extended to the States in *Mapps v. Ohio*—that their action in this area might be fruitless.

We, unfortunately, are strapped in Florida with language in our State constitution that embodies the exclusionary rule and we are now trying to get through our legislature a constitutional amendment that would allow Florida to be the beneficiary of whatever the standard at the time would be set by the Federal Government. So, it would help our State enormously in making the case that we need to amend our State constitution.

Senator DECONCINI. So the record is very clear; I take it the National Association of Attorneys' General do not support, or at least today are not advocating the abolishment of the exclusionary rule per se. They are talking about a standard as set forth in 1995 or 101.

Is that correct?

Mr. SMITH. The association at this point in time would go as far as the "good faith/bad faith exception."

Probably, you know, we would all, as law enforcement people, say let's do what Great Britain does, you know, and not have any restrictions on the policeman's ability to gather evidence.

But I do not think, frankly, that our country is ready to go that far. This is a reasonable step in the direction of providing more reasonableness in the gathering procedures for evidence in this country and a step that we need to take.

If we do not take some steps like this that are reasonable, at some point in time I fear we will see a gross political reaction to the crime wave in this country that will begin to run over what we are very, very jealously guarding: Some basic constitutional rights that citizens have and liberties that we do not want to give up.

This is a reasonable step and one that we need to take in a hurry, I think.

Senator DECONCINI. I agree with that. As a former prosecutor, my first reaction to this problem has been for many years to abolish the rule. But after getting actually to the legislation, I agree with the position that your association has taken. And I also agree with your observation that if we do not do something soon there may be an overreaction and the pendulum might swing further than all of us really would like to see it swing with the high crime rate.

Mr. Schmidt, if I could just get your comments.

The recent GAO study came out with the effects of the exclusionary rule and concluded that its application was not a substantial hindrance to law enforcement.

Are you satisfied that there are many guilty parties not prosecuted because of the exclusionary rule?

Mr. SCHMIDT. I believe in addition to the cases where search warrants or arrest warrants or warrantless arrests or searches result in evidence which is suppressed, there are a number of cases where prosecutors simply decline to issue an information.

That has been my experience with the Chicago Police Department, where I was legal adviser; in Albuquerque, N. Mex., where I was a working law enforcement officer while in college and law

school; and as generally in my duties as a legal adviser to police chiefs and sheriffs throughout the United States.

The thing that concerns me about the GAO study is that it apparently did not include the vast majority of the "street cases" here in the District of Columbia. It was a look at the U.S. district courts. And there are very few violent crime cases, particularly street crimes, that are prosecuted in our Federal courts.

I would like to see the GAO look at the Superior Court here in the District of Columbia and the practices of the District of Columbia police and the other law enforcement agencies that operate here, and to compare those statistics with the GAO studies of the U.S. attorney's offices elsewhere in strictly Federal matters.

Senator DECONCINI. Do you gentlemen think that the passage of one or both of these would have any effect on the quantity of litigation in the Federal courts?

Mr. Schmidt, can you comment on that?

Mr. SCHMIDT. I think that we are going to have the good-faith issue raised over and over again until eventually the Supreme Court comes down with a decision that everyone is satisfied with and will last for some years.

Whether there is legislation that assists that or not, I think this legislation will be very helpful in defining the issues and initiating a court test. But presently there are at least three cases over across the street in the Supreme Court right now where they can act on this, where these arguments have been raised in the amicus briefs, and it is just a matter of time before they are going to have to address this issue.

Senator DECONCINI. Mr. Smith.

Mr. SMITH. I don't think there is any doubt that this issue will be ruled on by the U.S. Supreme Court at some point in time.

I think it is clear that the Congress can act and I think should act in this area in stating national policy and, where appropriate, establish some guidelines that would enable the Supreme Court to do its job and perform its function with at least a policy statement from the Congress on an important issue like this.

Senator DECONCINI. Thank you, gentlemen, very much. I appreciate your help today.

We do have some questions we would like to ask you to respond to, if we could, but due to the time here we will just send them to you.

Mr. SCHMIDT. I have my statement here.

Senator DECONCINI. Both of your statements will be included in the record.

[The prepared statements and additional material submitted by Messrs. Smith and Schmidt follow.]

PREPARED STATEMENT OF JIM SMITH

Mr. Chairman . . .

Members of the subcommittee . . .

My name is Jim Smith. I am the Attorney General of the State of Florida and have been such since January 2, 1979.

I am pleased to be here today and honored to speak in behalf of the National Association of Attorneys General on this important legislation.

During its 1981 midwinter meeting, the association adopted a resolution in support of legislation that would allow introduction of evidence obtained in the course of a reasonable, good-faith search.

The premise of that resolution is that the exclusionary rule, as it has evolved in judicial practice, no longer serves its fundamental and legitimate purpose, which is to deter illegal police conduct.

Today we find the rule employed less to deter willful police misconduct than as a device to withhold evidence of the truth from our courts.

This use of the rule has made it a test not of 4th Amendment reasonableness, but of the absolute perfection of the investigative procedure followed by law enforcement officers in the field, frequently under trying conditions.

In the judicial interpretations that created the exclusionary rule, the constitution has been amended to impose standards that exceed the test of reasonableness.

The search for truth, which is fundamental to our system of justice, is actually being frustrated by a rule intended to compel respect for the rule of law.

I suggest this is a perverse and grim irony

imposed on a nation that is reeling from the impact of crime.

The exclusionary rule is one of a number of procedural safeguards that have so encumbered the criminal justice system with protections for defendants as to make the question of guilt or innocence nearly irrelevant.

Those developments, which include abuses of the writ of habeas corpus, have come not from the people through their elected legislators, but from judicial interpretations.

They are among the reasons why public confidence in the ability of the system to deliver justice in the name of public safety and order has been lost.

It is time for our legislatures to take appropriate steps to restore a proper balance to the criminal law and regain that confidence.

I have no trouble understanding public outrage when a trivial violation of the rule results in the release of a person charged with a serious crime who would be convicted by the evidence suppressed.

In such instances it is not the defendant who is on trial, but the officer who conducted the search.

I'm sure the committee has been given numerous examples in which the attention of the court was diverted from the question of guilt or innocence to the technical details of the search.

Society protects defendants by providing that they cannot be convicted and punished without proof of intent to violate the law.

Yet in following the rule we label police conduct "illegal" . . . and punish society . . . without any regard for the intent of the police officer.

Under the current rule, an officer might obtain evidence pursuant to a search warrant issued by a judge . . . thus meeting the highest constitutional test of review by an independent magistrate . . . and then have it suppressed by another judge who finds a defect in the warrant, such as an incorrect street address.

Mr. Chairman, this is neither law enforcement nor criminal justice. It's a charade . . . a game of dotting the "I's" and crossing the "T's."

Moreover, the rule supposes that a law enforcement officer understands the requirements of a lawful search that have never been clearly defined by the courts themselves in hundreds of cases.

In many cases, legal precedent is directly contradictory or does not exist at all.

This is an unreasonable burden on responsible law enforcement.

As Justice Harlan said in Coolidge v. New Hampshire:

The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

The National Association of Attorneys General would urge the Congress to modify the rule legislatively to incorporate a good-faith test of admissibility.

This test is expressed in S. 1995 and was adopted by the 5th Circuit in United States v. Williams.

In simple terms, it says the exclusionary rule will not apply to evidence seized by an officer acting in good-faith belief that his conduct is constitutional when he has a reasonable basis for that belief.

So there are two tests:

1. Subjective good-faith by the officer.
2. Objective reasonable grounds for the action.

Under the test a criminal will continue to go free if an officer has willfully violated the 4th Amendment, but not if an honest mistake occurred which any reasonably trained police officer could make.

S. 1995 also provides definitive standards for determining whether evidence improperly seized may be admissible. I particularly commend the standard requiring any violation of the defendant's rights to have resulted in actual prejudice to such defendant.

This would be a significant step toward restoring reality and rationality to the law of search and seizure . . . applying the concept of proportionality.

Too often the rule leads to the suppression of irrefutable factual evidence of guilt, requiring our courts to set aside their duty to see that the truth is brought out.

Because of its specific standards for applying the good faith test, S. 1995 would be my first choice for congressional enactment. I believe it could be improved by language making the tort remedy it provides the exclusive remedy for violation of constitutional rights.

My second choice is S. 751. It has the advantage of being easy to administer and contains sanctions to deter illegal police conduct.

Its unfortunate that Mapp v. Ohio prevents a state from trying this approach to test its suitability for application to the federal government and other states.

I would also find S. 101 acceptable as a remedy for the serious detriment to justice under the law that has arisen through use of the rule.

I might say . . . Mr. Chairman . . . that the states are looking to the federal government to make this change in the exclusionary rule because of Mapp v. Ohio.

We anticipate that the states will then follow suit.

I would be remiss if I did not point out that these much-needed reforms deal only with federal criminal trials and do not speak to the problems experienced by the states.

Somewhere, the states should be given relief from the abuses spawned by the exclusionary rule.

First, the Congress should make it clear that no federal court should order the exclusion of evidence . . . or declare a state court judgment and sentence invalid . . . if the evidence would have been admissible in a federal district court.

Surely there should not be one set of rules governing state courts and another for federal courts. Indeed, the United States Supreme Court itself has rejected such a notion in Kaufman v. United States.*

Also, the limitations on civil liability against the federal government for any violation of 4th Amendment rights by federal agencies should be extended to the states when an individual seeks damages in 1983 actions brought under the Civil Rights Act.

There has never been an absolute protection from illegal searches. If this was so, the United States Supreme Court would prevent use of illegally seized evidence in all proceedings against all persons, which it does not under

*394 U.S. 217, 230 (1969).

existing decisions.

We would ask where is the 4th Amendment, and where is probable cause, when the briefcase of an attorney . . . an officer of the court . . . is searched before entering the U. S. Supreme Court or the Capitol?

Where is the 4th Amendment when luggage is being searched before passengers may board an airline?

Are the rights of ordinary citizens less than those afforded criminal defendants?

Shouldn't police officers have as much right, acting responsibly, to protect public safety on the streets as they do in airline terminals or government buildings.

The supposition is that law abiding citizens prefer the search to the hazard. This same justification applies to what we propose here today.

We submit that the price of excluding evidence seized in good faith . . . without knowledge of its illegality . . . is too high for a society of laws to pay.

I would like to quote from a well-reasoned dissent in a search and seizure case by the Honorable J. Truett Ott, Judge of Florida's 2nd District Court of Appeal.

There is no such thing as absolute freedom in today's complex society. Every reasonable person expects to sacrifice a measure of his personal freedom, not only that his neighbor enjoy equal rights, but for his own benefit and protection.

It is unrealistic to exclude that spirit of compromise from the rules governing our law enforcement agencies.

With the Chairman's permission, I will attach the full text of that dissent to my testimony. It eloquently states the case for modifying the rule.

Summary of Statement

The exclusionary rule, as it has evolved in judicial practice, no longer serves its intended purpose.

The rule is justified only by the extent to which it deters illegal police conduct. This was its fundamental and legitimate purpose. However, it is employed today less to deter willful police misconduct than as a device to withhold evidence of the truth from our courts.

Use of the rule has made it a test not of 4th Amendment reasonableness, but of the absolute perfection of an investigative procedure conducted in the field, frequently under trying conditions.

We are here today because the rule has strayed from the application intended in the judicial interpretations that created it. In effect, the constitution has been amended from the bench to impose standards that exceed the test of reasonableness.

The search for truth, which is fundamental to our system of justice, is being frustrated by a rule crafted to compel respect for the rule of law.

The exclusionary rule is one of a number of procedural safeguards that have so encumbered the criminal justice system with protections for defendants as to make the question of guilt or innocence nearly irrelevant.

It is time for our legislatures to take appropriate steps to restore a proper balance to the criminal law and regain that confidence.

The National Association of Attorneys General would urge the Congress to modify the rule legislatively to incorporate a good-faith test of the admissibility.

Enclosure.



M. A. P., a child, Appellant,

v.

STATE of Florida, Appellee.

No. 80-1681.

District Court of Appeal of Florida,
Second District.

Sept. 30, 1981.

Defendant, charged by petition with possession of less than 20 grams of marijuana, was adjudicated by the Circuit Court, Hillsborough County, Daniel Gallagher, J., to be delinquent child, and he appealed. The District Court of Appeal held that: (1) facts gave rise to founded suspicion sufficient to warrant investigatory stop of defendant; (2) facts failed to provide officer with reasonable belief that defendant was armed so as to sustain frisk incident to investigatory stop; and (3) facts did not provide officer with probable cause to arrest defendant.

Reversed and remanded.

Ott, A. C. J., dissented and filed opinion.

1. Infants — 254

The District Court of Appeal did not disturb finding of trial court which adjudged defendant to be delinquent child that defendant did not consent to emptying contents of paper bag where such finding was supported by evidence.

2. Arrest — 63.5(4)

Under "stop and frisk" law, officer must have founded suspicion that person has committed, is committing or is about to commit crime before he may lawfully detain person. West's F.S.A. § 901.151.

3. Arrest — 63.5(5)

Defendant's dropping paper bag at corner, coupled with officer's knowledge concerning previously abandoned paper bag which was found to contain marijuana at same location gave rise to founded suspicion sufficient for officer to lawfully detain defendant. West's F.S.A. § 901.151.

4. Arrest — 63.5(8)

Frisk or pat-down incident to investigatory stop may be conducted only where officer has reasonable belief that person detained is armed with dangerous weapon and therefore offers threat to officer or another person. West's F.S.A. § 901.151(5).

5. Arrest — 63.5(9)

Frisk of detainee conducted after investigatory stop is limited in scope and is only permissible to extent necessary to disclose and for purpose of disclosing presence of weapon. West's F.S.A. § 901.151(5).

6. Arrest — 63.5(9)

Permissible scope of frisk incident to investigatory stop may extend to container, such as woman's handbag, under appropriate circumstances. West's F.S.A. § 901.151(5).

7. Arrest — 63.5(8)

Where officer admitted that he did not believe that defendant had weapon or in any way posed threat to officer's life and testified that he did not believe bag in defendant's possession contained anything other than narcotics, officer did not have reasonable belief that defendant was armed

so as to sustain/frisk incident to investigatory stop. West's F.S.A. § 901.151(5).

8. Arrest ⇐ 71.1(2)

Warrantless search incident to arrest is lawful if officer has probable cause to arrest before he conducts such search.

9. Arrest ⇐ 63.4(2)

Test to determine probable cause to arrest is whether facts and circumstances within officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant man of reasonable caution in belief that offense has been committed.

10. Arrest ⇐ 63.4(16)

Fact that defendant dropped paper bag on corner at which other bag containing marijuana had previously been abandoned did not provide officer with probable cause to arrest.

Jerry Hill, Public Defender, Bartow, Robert F. Moeller, Asst. Public Defender, Tampa, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and Charles Corces, Jr., Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Appellant, a juvenile, was charged by petition with the possession of less than twenty grams of marijuana. His motion to suppress the contraband was denied, and he pled *nolo contendere* to the charge, specifically reserving the right to appeal the denial of his motion to suppress. The trial court adjudicated him to be a delinquent child. We reverse.

At the hearing on the motion to suppress, the arresting patrol officer testified that at 11:30 a. m. on the date of the arrest, he had observed the appellant, who was unknown to him, beside a mailbox in front of a convenience store with a brown paper bag in his hand. The officer recalled that immediately thereafter he saw the appellant drop the bag and run into the store. The officer then circled the block after which he again observed the appellant, who was now walk-

ing his bicycle, with a brown paper bag in his hand. At this point the officer stopped the juvenile because he suspected that the bag contained narcotics. The officer specifically testified that he did not believe that the bag contained anything other than narcotics and that there was nothing about the appellant that made him fear for his life. Once he had stopped the appellant, the officer did not ask appellant for his identity nor did he ask appellant his purpose for being in the area. Rather, he asked the appellant to place the bag on the hood of the police car and remove its contents. Appellant removed some items of clothing and said that was all there was in the bag. However, the officer persisted in his request that appellant empty the bag completely. At that point appellant complied and three baggies of marijuana, which appellant was later charged with possessing, fell out. In his further testimony the officer explained that approximately three or four days prior to this event an unknown individual dropped a brown paper bag at the same corner after which he ducked behind a building. On that occasion the officer retrieved the abandoned bag and found that it contained twenty-seven baggies of marijuana.

[1] The trial court found that the appellant did not consent to the emptying of the contents of the bag. That finding is supported by the evidence and we, of course, do not disturb it. After making that finding, the court went on to rule that the stop of appellant was proper and "because the stop was legal the subsequent search was not unreasonable nor illegal."

[2, 3] The appellant disputes that ruling by first contending that the officer was not justified in stopping him and that, therefore, the evidence seized after the illegal stop was tainted and should have been suppressed. Appellant correctly notes that under our "stop and frisk" law a law enforcement officer must have a founded suspicion that a person has committed, is committing, or is about to commit a crime before he may lawfully detain such person. § 901.151, Fla.Stat. (1979); *State v. Stevens*, 354

So.2d 1244 (Fla. 4th DCA 1978). "A 'founded suspicion' is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances are interpreted in the light of the officer's knowledge." *State v. Stevens* at 1247. While the appellant's actions alone may not have provided a founded suspicion, we believe that those facts coupled with the officer's knowledge concerning the previous offense at the same location did give rise to a founded suspicion. We believe that the initial investigatory stop was proper and we disagree with appellant's contentions to the contrary.

Appellant's second contention is that, assuming the stop was justified, the compelled emptying of the bag was not. Appellant argues that, for this reason, the marijuana should have been suppressed. We agree with this contention.

[4-6] A frisk or pat-down incident to an investigatory stop may be conducted—but only where a law enforcement officer has a reasonable belief that the person detained is armed with a dangerous weapon and therefore offers a threat to the officer or another person. § 901.151(5), Fla.Stat. (1979); *State v. Webb*, 398 So.2d 820 (Fla.1981). Furthermore, any such frisk of a detainee conducted after a stop is limited in scope and is only permissible to the extent necessary to disclose and for the purpose of disclosing the presence of a weapon. § 901.151(5), Fla.Stat. (1979). We note that the permissible scope of a frisk may extend to a container, such as a woman's handbag, under appropriate circumstances. *Dawson v. State*, 40 Md.App. 640, 395 A.2d 160 (1978).

[7] The facts in the instant case failed to provide the officer with a reasonable belief that the appellant was armed. In fact, the officer candidly admitted that he did not believe appellant possessed a weapon or in any way posed a threat to his life. Under these circumstances, the officer could not ~~legally conduct the frisk~~. The officer testified that he did not believe the bag contained anything other than narcotics. Clearly, the officer's insistence on seeing the contents of the bag was not done for the purpose of discovering a weapon.

[8-10] The state appears to suggest that the compelled emptying of the paper bag was permissible as a search incident to appellant's arrest. A warrantless search incident to an arrest is lawful if the officer has probable cause to arrest before he conducts the search. *Dixon v. State*, 343 So.2d 1345 (Fla.2d DCA 1977). As we noted in *Dixon*, the test enunciated by our supreme court to determine probable cause to arrest is whether "the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed." *Dixon* at 1348. While, as noted previously, we believe the officer had a founded suspicion to justify his investigatory stop of the appellant, we do not believe that the facts in this case provided the officer with probable cause to arrest.

Based on what we have said, we find the contraband was illegally seized. Accordingly, the order adjudicating appellant to be a delinquent child is reversed. The case is remanded with directions that the trial court enter an order suppressing the evidence seized from appellant and for further proceedings consistent with this opinion.

REVERSED and REMANDED with directions.

DANAHY and CAMPBELL, JJ., concur.

OTT, Acting C. J., dissents with opinion.

OTT, Acting Chief Judge, dissenting.

I dissent, not because I think the police officer acted wisely and reasonably (which I do), but because the trial court, acting well within the bounds of its discretion, thought so. I would affirm the ruling of the trial court and add a "well done" for the officer. He does good work.

We hire intelligent police officers and train them to be observant, to look for the small tell-tale signs of illegal activity, such as furtive movements, guilt-ridden demeanor and odd behavior—clues the untrained

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Cite as, Fla. App., 403 So.2d 1384.

observer would either not notice or would deem inconsequential. But when an officer's honed instincts tell him something peculiar is going on, and he smells illegality in the very air, we forbid him from pursuing the matter unless, at that precise moment of merely "aroused suspicion," he has probable cause to arrest the suspect.

True, we permit him to detain and interrogate the suspect, provided he has a "founded suspicion" that a criminal act has occurred, is in progress or is about to occur, but the only searching we permit is for the limited purpose of ascertaining whether the suspect is armed.

I sincerely wish that someone would explain to me what was wrong with what the officer did in this case. Under circumstances found to be sufficiently suspicious to justify stopping the boy, what in the world was objectionable about looking into the paper bag? After all, it was the suspect's conduct with respect to that bag that aroused the officer's interest in the first place. He had observed the same brown bag "drop" and "pick up" scenario before and found it to be the means of delivering marijuana. It isn't as though the officer used his "founded suspicion" as a pretext for stopping the suspect and then pawed through the boy's possessions on a fishing expedition. As a matter of fact, I would be much more apt to fault an officer, under identical circumstances, for *not* checking the contents of the bag. I am compelled to add, with no thought of suggesting that ends justify means, that the officer's suspicions proved to be well warranted.

It seems to me that some of the new rules devised to protect or effectuate constitutional guaranties of freedom are unduly academic. I am by no means in the ranks of those who castigate the courts for "coddling criminals." I am satisfied that no rule formulated by any appellate court in this land was ever intentionally designed to make it easier for criminals to evade their just deserts. The problem confronting the courts is that it is simply impossible to safeguard the liberty of law-abiding citizens and simultaneously deny protection to

those accused but not yet finally convicted of crime. In truth, not until one is accused of illegal conduct do those constitutional guaranties become at all important.

But that is not to say that courts have infallible wisdom or perception. Sometimes their motives are laudable but their methods are unfortunate.

There is no such thing as absolute freedom in today's complex society. No one has completely unfettered liberty. Every reasoning person expects to sacrifice a measure of his personal freedom, not only in order that his neighbor enjoy equal rights, but for his own benefit and protection. It is unrealistic to exclude that spirit of compromise from the rules governing our law enforcement agencies.

The key to that compromise lies in the use of the word "unreasonable." Not every search or seizure is an invasion of privacy, only those that are unreasonable. What is reasonable is going to vary from case to case. In the instant case, I can find nothing unreasonable in the actions of the police officer. More aptly, I am unable to say that the trial judge abused his discretion in ruling that he, supposedly the trier of fact, found nothing unreasonable in the officer's conduct.

This would be a wonderful world if there were no crime, no need for police officers and no such thing as a search or seizure. But there *is* crime, increasingly, and we hire efficient police for our protection. It isn't us against the police, but us against the criminals, and the police are but our soldiers in that war. Surely we know by now what happens when troops are committed to battle with their hands tied.

No one disputes that an honest person should not be required to suffer the embarrassment or even the inconvenience of an arbitrary search of his person or property. But if his behavior, though innocent, reasonably suggests illicit activity, and he is at all interested in preventing or curbing crime, he will compromise his personal freedom (or privacy) somewhat if his greater goal is to be attained. No innocent person fears or is outraged by courteous, reasona-

ble and justified interrogation or investigation by a police officer. Every intelligent person knows that the officer is simply doing, as efficiently as possible and as thoroughly as necessary, the job we hired him to do.

in ivory-tower meditation, and I most heartily subscribe to the proposition that individual freedom must be as pure as practicality permits, but let's not lose sight of the limiting factors imposed by the real world.

It is all very well to pursue pure freedom

PREPARED STATEMENT OF WAYNE W. SCHMIDT

My name is **Wayne W. Schmidt** and I am Executive Director of **Americans for Effective Law Enforcement, Inc.** I have been with AELE since 1973; before then I was director of the legal center of the International Association of Chiefs of Police, director of the police legal advisor training program of Northwestern University School of Law, and I also served as a legal advisor to the Chicago Police Department.

I am pleased to be here to present the views of AELE, **Americans for Effective Law Enforcement, Inc.** AELE is a tax-exempt, not-for-profit educational corporation, founded in 1966 by a group of distinguished attorneys and professors. AELE, which is sometimes called the "police chief's ACLU," conducts training programs for police executives and their legal counsel, publishes five law enforcement periodicals, and offers legal research assistance and advice to inquiring police administrators. AELE has also filed over seventy "friend of the court" briefs, more than half of them with the U.S. Supreme Court.

We wish to associate ourselves with the views expressed on October 5th in 1981 by Mr. D. Lowell Jensen, Chief of the Criminal Division of the U.S. Department of Justice. Last year, in hearings before the Attorney General's Task Force on Violent Crime concerning the "good faith" exception to the exclusionary rule, we made similar recommendations on this matter. We also wish to identify ourselves with the concerns of Mr. Frank Carrington of the Crime Victims Legal Advocacy Institute, Inc. as to the incredibly complex state of the law respecting search and seizure.

My testimony will focus on what could be a serious impediment to implementation of the "Good Faith Exception": The difficult burden of objectively determining what is, and what is not, apparent good faith.

The Task Force has recommended that the procurement of a search warrant from a neutral and detached magistrate should constitute prima facie evidence of good faith. AELE shares that position. The vast majority of searches, however, arise on the street, or in a home or business in response to a radio call. To alleviate the complexity of the problem, Congress gives the courts guidance in resolving the issue of whether an officer acted in apparent good faith.

To answer this question, we ask that you consider the adoption of an existing legal standard as evidentiary proof of good faith. The U.S. Supreme Court has already determined that a quantum of proof of less than probable cause is sufficient in certain limited situations. That standard, known as a "reasonable suspicion" of guilt, of criminal conduct, is allowed for investigatory "stops" and for a "frisk" where an officer reasonably suspects that a citizen is armed.

The reasonable suspicion standard has existed since 1968, when it was first announced in Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868. As of November, 1980, the Terry decision has been cited as authoritative law in over five thousand, three hundred cases. *

These cases are, for the most part, appellate decisions in state courts, although some federal trial court decisions are also included. State appellate courts consist of three, and sometimes five justices. Their opinions are carefully researched and thoughtfully written. Thus, thousands of judges and justices in over fifty-three hundred cases have expressed themselves on reasonable suspicion.

* Mr. Allan Cohan of San Francisco, a graduate of Lincoln University School of Law, counted the published cases citing the Terry opinion at my request. Listed below are the number of times the Terry case has been cited since it was decided in 1968.

<u>Shepard's Supreme Court Reporter</u>	<u>Number</u>
Case Edition 1943-1971	492
Case Edition 1971-1976	2,056
Case Edition 1976-1980	1,669
Semi-annual Supplement	
Jan. 1981-Vol. 80, No. 1 (yellow)	554
Cumulative Supplement, Nov. 1981	
80, No. 6 (Red)	550
Total number of citations	<u>5,321</u>

On January 4, 1982 a LEXIS computer check of Terry was undertaken; there were 282 pages of citations, indicating approximately 5,635 citations. In addition there are 33 law review articles on the subject.

In the early days following the Supreme Court's opinion in Terry, appellate courts had little guidance to apply to diverse factual situations. As a result, many of the early decisions conflicted, with state supreme courts and federal appeals courts having to go through the difficult process of evaluating the meaning of the Terry opinion and thus refining the law of reasonable suspicion.

Now, however, there is a large body of judicial decisions in every state and every federal circuit which clearly enunciates what is meant by reasonable suspicion. These decisions are based on over five thousand different factual situations predicated these published opinions.

AELE urges this Committee, therefore, to consider the following statutory amendment:

Good Faith - Determination of:

1. Whenever a law enforcement officer conducts a search pursuant to a search warrant obtained from a neutral and detached magistrate, such warrant shall constitute a presumption that the officer has acted in apparent good faith.

2. Whenever a law enforcement officer conducts a search without a search warrant, there is a presumption that the officer has acted in good faith when:

a. The officer reasonably believed that he possesses probable cause to make the search, and

b. The officer in fact possessed only a reasonable suspicion that the person or premises searched possessed or contained items of an evidentiary nature, and

c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant.

The first provision is easy to demonstrate; either the police officer obtained a search warrant from the proper judicial officer or he did not. The second provision calls into perspective the more than five thousand factual situations and judicial decisions relating to reasonable suspicion. Based on this standard, courts should be able to apply the "Good Faith Exception" by a ready reference to pre-existing case law based upon a wide variety of factual situations.

As indicated in the Williams decision so often mentioned in prior testimony, ignorance of the law is no excuse. Officers would still have to be properly trained and articulate in the law of search and seizure. (See footnote 4a in Williams 622 at F. 2d 830 at 841). By adoption of the reasonable suspicion standard as the good faith test, however, law enforcement training would be greatly simplified. Officers would be taught two steps of proof, reasonable suspicion and probable cause; indeed, they already are thoroughly familiar with these standards.

We strongly urge that the "**reasonable suspicion standard**" be incorporated into S. 101 at the earliest opportunity. Without adoption of this standard, federal courts (and state courts that follow similar state legislation) will have little guidance for deciding cases in this area. Indeed, some courts might adopt standards so rigorous that exclusionary rule reform would be all but non-existent.

Anticipating criticism from some commentators that the reasonable suspicion standard is too lax, we wish to remind them that it was adopted by eight justices of the "Warren Court," as a standard by which evidentiary items become admissible in certain cases. It is everymuch a Constitutional standard as is probable cause, but with limited application. It does not permit an officer to act on a "hunch" but demands that he have underlying factors supporting his belief. In most cases it is a combination of factors, as one factor alone is normally not enough to justify his actions. However, even a combination of these factors may not necessarily reach the level of probable cause. A brief discussion of these factors, and the case law which has developed, is summarized in an appendix to this statement.

The final issue We wish to address is the assertion that federal agents and local law enforcement officers will abuse the good faith exception to the exclusionary rule. The Williams decision became the law of the Fifth Circuit in late July of 1980.* What evidence has there been of any abuses in the Fifth Circuit since that time? On December 16, 1981 this matter was discussed with Mr. James L. Powers, Chief of the Criminal Division of the U.S. Attorney's Office in Houston (the Southern District of Texas). He stated that he has no knowledge of a single instance of attempted abuse of

* U.S. v. Williams is now the law of the new Eleventh Circuit; see Bonner v. City of Prichard, Alabama, 50 U.S. Law Week 2318 (Nov. 3, 1981).

the good faith exception, even though during 1980 there were 1185 criminal filings in this district, or about 99 a month.

Similarly, on November 18, 1981 Mr. William R. Favre, Jr. of the Southern District of Alabama at Mobile, stated that he, too, was unaware of any attempted abuses. That district had 119 criminal cases docketed in 1980. Also, on November 17, 1981, Mr. C. Brian McDonald, First Assistant U.S. Attorney in Miami, indicated that there were 602 criminal filings in the Southern District of Florida in 1980, and he did not know of a single instance of abuse of the good faith exception during this period of nearly 18 months.

In summary, AELE urges the Congress as well as the courts, to adopt a "Good Faith Exception" to the exclusionary rule. It is important, however, to clearly define what is meant by good faith. To this end, we propose that evidence should be admissible whenever a law enforcement officer conducts a search in the belief that he possesses probable cause and (a) a search warrant has been issued or (b) he has a reasonable suspicion that the person (or premises) searched possessed (or contained) evidentiary items, and the circumstances reasonably excused procurement of a search warrant.

Summary of Statement

Americans for Effective Law Enforcement, Inc. (AELE) urges the Congress to modify the Exclusionary Rule and adopt the "Good Faith Exception" already embraced in the Fifth and Eleventh U.S. Circuit Courts of Appeal. We further urge the adoption of a statutory definition of Good Faith which would guide the courts, state legislatures and law enforcement officers. We propose language similar to the following:

Good Faith - Determination of:

1. Whenever a law enforcement officer conducts a search pursuant to a search warrant obtained from a neutral and detached magistrate, such warrant shall constitute a presumption that the officer has acted in apparent good faith.
2. Whenever a law enforcement officer conducts a search without a search warrant, there is a presumption that the officer has acted in good faith when:
 - a. The officer reasonably believed that he possesses probable cause to make the search, and
 - b. The officer in fact possessed only a reasonable suspicion that the person or premises searched possessed or contained items of an evidentiary nature, and
 - c. The officer reasonably believed there were circumstances excusing the procurement of a search warrant.

The majority of evidentiary seizures are made without judicial warrant. The "Reasonable Suspicion" standard, as traced in over five thousand published judicial opinions, will serve as a useful indicator to the courts and as a necessary training standard for police and federal agents.

APPENDIX

As previously indicated in the text of my testimony, police officers have substantial guidance in the body of case law following the Terry decision. For example, the June 1979 issue of the Search and Seizure Law Report mentions more than five dozen cases in the bulletin entitled "Factors Which Justify a Stop and Frisk." To illustrate the development of case law, I have quoted below portions of the text of the copyrighted bulletin. (Quotation is with the permission of the publisher, Clark Boardman Co. Ltd.).

FACTORS WHICH JUSTIFY A STOP AND FRISK

by Steven C. Bell

Member of the New York Bar

In only the rarest of cases will a stop be justified because of the appearance of a single suspicious factor. However, it is also rare that only a single factor will be present in a particular case. Many of the factors enumerated below regularly appear in combinations which give the court a sufficient basis upon which to find that the officer was justified in making a stop.

* * *

Personal knowledge and experience of officer

The experience of the police officer is almost universally cited by courts upholding an investigative stop as a significant factor in finding that reasonable suspicion existed.

Suspicious conduct

A person's conduct may reasonably arouse the suspicions of a police officer when that conduct indicates to the officer's trained eye that a criminal transaction is taking place.

* * *

For example, the police were held to have reasonable suspicion to stop a man when carrying two color television sets in a high-crime neighborhood beset by burglaries.

* * *

In other cases, courts have held that officers had a reasonable suspicion of criminal activity based in part upon their observation of the passing of objects between two persons, or the exchange of an object for money.

* * *

Sole reliance upon profiles has consistently been rejected by the courts, because

all of the characteristics in the profiles are consistent with completely innocent conduct.

Demeanor of suspect

Nervousness or an excited demeanor exhibited in the presence of officers may arouse reasonable suspicion of criminal activity in combination with other suspicious or unusual circumstances.

However, nervousness or excited demeanor by itself carries no indicia of criminal involvement, and a number of courts have invalidated stops when the demeanor is the only factor the officer can articulate to justify the stop.

Furtive gestures

The "furtive gesture" is often cited as grounds for reasonable suspicion to conduct a stop and frisk of a suspect.

Often such conduct is comprised of innocent movements on the part of a suspect, and therefore, absent other suspicious circumstances, several courts have refused to allow stops justified wholly on the basis of furtive gestures.

Attempts to flee or avoid uniformed officer

An attempt to avoid a uniformed police officer may be the determinative factor in giving an officer reasonable suspicion to stop a suspect when other factors are present arousing the suspicions of the officers.

Similarity to description of wanted persons

A physical appearance fitting the description of a person wanted for a reported offense, or of a vehicle used by a suspect, will generally give reasonable suspicion to stop the person to investigate further.

The description must contain more than general characteristics that could fit any of a large number of people, and the suspect must fit the description in more than a general way.

If a stop takes place in an isolated location or late at night, the likelihood of other persons fitting the description being in the area is sufficiently decreased to warrant a stop even when based upon a vague description of the suspected perpetrator of an offense.

Time and place of stop

The time and the place in which a suspect is seen by an officer may give

sufficient color to the suspect's conduct to give reasonable suspicion for a stop when it might not otherwise be justified.

* * *

However, the time and place alone would appear to rarely, if ever, justify making a stop of a suspect who is not otherwise engaging in colorably suspicious conduct.

* * *

High crime areas; "suspect" Locations

Police will often rely on the character of the location in which the suspect is seen to justify an investigative stop of the suspect. Many courts have found that the character of the area is a significant factor in finding that an officer has reasonable suspicion of criminal activity.

* * *

Nearness to scene of crime

The spatial and temporal proximity of a suspect to the occurrence of a crime is often a relevant factor to the justification of a stop.

* * *

In such circumstances, the facts giving rise to a reasonable suspicion to stop will often be from a report by a witness or victim of the crime regarding the physical appearance of the perpetrator.

* * *

Nonetheless, even late at night near the scene of a crime, officers do not have a free hand to conduct dragnet-type stops of suspects.

Senator DeCONCINI. We will now have a panel consisting of Mr. John Cleary, executive director, Federal Defenders of San Diego; Mr. Benjamin Lerner, director, Defenders Association of Philadelphia; and Mr. Gerard F. Treanor, Jr., National Association of Criminal Defense Lawyers.

Gentlemen, your full statements will be included in the record and you will help us timewise by limiting your oral testimony to 10 minutes. Mr. Cleary.

STATEMENT OF A PANEL CONSISTING OF JOHN J. CLEARY, EXECUTIVE DIRECTOR, FEDERAL DEFENDERS OF SAN DIEGO, INC., LEGISLATIVE SUBCOMMITTEE OF THE FEDERAL AND PUBLIC DEFENDER ADVISORY COMMITTEE; BENJAMIN LERNER, DIRECTOR, DEFENDERS ASSOCIATION OF PHILADELPHIA, NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION; AND GERARD F. TREANOR, JR., NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. CLEARY. Thank you very much, Senator DeConcini. It is a privilege to be here.

I would like to start off by identifying myself as 1 of the 39 Federal defenders in the United States for the 95 districts. These are the organized Federal defense services. We might be able to provide the Senate with the perspective more in line with reality than rhetoric.

It is unfortunate that we tend to look at the exclusionary rule as something of recent origin that seems to hamstring the police, especially in Federal court. I know that the legislation proposed deals

solely with Federal courts and would like to respond in that direction.

First, the exclusionary rule itself was developed in a case in 1914, *Weeks v. United States*. But the two basic reasons for the rule set forth at that time had nothing to do with police deterrence. That court was a conservative court. The court held that the fourth amendment might as well be struck from the Constitution not to exclude evidence seized in violation of it. The court went further to point out that judges that take an oath to support the Constitution would violate that oath and trust to allow evidence seized in violation of the Constitution.

The next case was 1920, *Silverthorn*. The Justice in that case was not some Bolshevik radical infused onto our system of government, but one who is dearly respected: Justice Oliver Wendell Holmes. He said not to suppress the evidence is to reduce the fourth amendment to a form of words.

At that time there was some consideration as to whether or not the Bill of Rights was under the 14th amendment due process clause made applicable to the States, because the States contended the fourth amendment did not apply. That issue was resolved in 1949. The *Wolf* case held that the due process clause required the States to respect the fundamental right of privacy, but did not adopt the exclusionary rule.

In 1961 we had *Mapp v. Ohio*. I always find it fascinating to look at the personalities. That was decided by Justice Tom Clark, who was the former Attorney General for the United States, who was also responsible or involved with the detention of Japanese Americans during World War II. This man had a chance to reflect and know and understand the needs of law enforcement and held that evidence seized in violation of the Constitution cannot be used in court proceedings. It was only fair to the defendant, fair to honest law enforcement, and fair to the judges and their oaths.

There are other rules or reasons for the fundamental right to exclude evidence. The first is the right of privacy; the right to be let alone, especially by Government. That is the basis for the fourth amendment.

When we look at privacy, is there not some respect of the individual, some area, some individuality, that must be respected by the Government? Or does the State have the right over all? Is every individual in our society subordinate to the State?

It reminds me of a song: "Deutschland uber alles," "The state over all."

No; in our society we allege, if we are not hypocrites, that the individual is on a status equal to that of the Government and any of the Government agents.

The deterrence of law enforcement is one of the bases for the exclusionary rule, is a very simple one. It is based on the fact that the Government should not profit from its wrongdoings. But we have so attenuated the rule that it is almost intellectual mush in its present state. But that is not enough. We have to go one step further and introduce this illusory, ambiguous, no standard, open door, green light, do anything you want, exception.

Now, ignorance will become virtue because if you know the rule, then you are responsible and may have committed a violation.

Another reason for the exclusionary rule is public respect for government. There is little I can add to what Justice Brandeis said in his dissent in *Olmstead*, which basically was if the Government becomes a government of lawbreakers, agents who violate the Constitution, what respect will the citizens have for those agents of the Government? What respect will be generated for government at all? We will develop a law unto each person.

When we hear of the good-faith exception for criminal cases we are told that there are other alternatives that people may use to obtain redress if they are wronged by police officers.

Well, that is not the facts of life. Any practicing prosecutor, any knowledgeable defense attorney, any experienced judge, knows that civil actions or other alternatives do not work.

What are they?

The criminal action against the offending officer.

Can you tell me the last major criminal action against anybody where there was a law enforcement for violation of illegal search and seizure?

United States v. Mark Felt, formerly with the FBI.

What did the prosecutor say in closing argument in November 1980 about the black bag job by the FBI? He told that jury: Let the Constitution ring out loud and clear.

The jury comes back—those stupid folks; they do not know what is going on—"guilty."

Sentence? Oh well, you only violated the Constitution. Fine. Don't feel depressed.

So, he is fined. The case goes up, and he is pardoned in March of 1981.

That is not enough. The defendant is still pursuing his criminal appeal, the case is still pending because he is concerned about civil liability.

But that is a rare case.

Criminal contempt: Dean Wigmore suggested that when the person comes to court that broke into the house and found the stolen property the court finds the evidence is admissible. The defendant is sentenced to 1 year in State prison. Take him away. You, Officer Jones, for your contumacious conduct in violation of the fourth amendment, 30 days. Take him away.

Well, in my 20 years of law practice I have never encountered a judge who even had that thought gently flow upon his mind.

Internal discipline: This alternative is becoming more popular. In fact, there is legislation now along that line. I offer two responses St. Paul, "There but for the grace of God go I."

Police officers find it most difficult to evaluate other police officers for violations of the fourth amendment. A Chicago police detective, who described it so well when asked to comment upon the internal investigation division of the Chicago Police Department, said: "It is like one great big washing machine. Everything comes out clean."

What about civil actions against the officers? What lawyers are going to take these civil suits? How much money would it take to obtain a lawyer to prosecute this civil claim, even with the 1976 legislation permitting attorneys fees to the prevailing party? A great deal more than the plaintiff might be able to risk.

There is also the action against the Government. In 1974 this Congress in response to the Collinsville, Ill., raids by Federal narcotics agents adopted an amendment to the Federal Tort Claims Act to curb the action of Federal agents conducting improper searches. And now we are going to give them an open ticket—the excuse of good faith, which depends on subjective state of mind of the officer.

Under adversary system everyone is supposed to be treated equal in the courtroom. In the courtroom we use various rules of evidence. But everybody says: Let all the truth come in. What about tortured confessions? If a State officer tortured, whipped, and beat a confession out of somebody, should "this truth" be permitted as evidence?

In *Brown v. Mississippi*, those were the facts, but the Supreme Court because of the citizen's right to due process kept that statement out. The Mississippi Supreme Court had said it was admissible evidence because it was trustworthy. Those officers probably thought it was a good faith interrogation.

The "good-faith exception" if enacted will swallow up the exclusionary rule.

I can add very little to the recent Georgetown Law Review article, Senator, or the more recent article to the Notre Dame Lawyer.

In my prepared statement I tried to make reference to several case decisions and their various authors. One of the members of the Supreme Court who refused to join in the majority opinion in *Mapp v. Ohio*, Justice Potter Stewart, recently retired. After he was off the bench, he commented on the exclusionary rule and the proposed "good-faith exception." He said that the good-faith exception reduced the rule to a subjective standard that is probably unenforceable.

I would like the Senator to bear with me because, although we are on opposite sides of the table—maybe in more ways than one, or based upon your prior experience—I would like a little empathy, if not sympathy.

Many of our clients who come to court hear the officers testify. They reluctantly realize that when the judge hears their testimony and that of the police officers, the judge accepts the officers' statements. Too often we hear the officer's ritualistic words that the evidence seized "was in plain view." Police officers testify the defendant went begging them to open the trunk where contraband is found. The consent that justifies the search is denied by the defendant.

The court regulars get used to it, but the client, who might not deny to you the guilt of the offense, is properly offended that this police officer would lie about the search.

We say to client: What can you do? If we put you on the stand, your self-serving statement would not be believed.

They are really shocked and offended that this type of ritual exists in the system. It is unhealthy.

Senator DeCONCINI. Who is shocked? The defendant?

Mr. CLEARY. The defendants and I, as a lawyer, am shocked because I have to give them a candid assessment of what is going on in the courtroom.

The public unaware of these courtroom hearings weighted in favor of the police are led to believe that motions to suppress evidence are regularly granted.

The GAO report that you referred to stated 3 percent of the motions to suppress were granted in whole or in part, but the thing not told and really well known is that half of those cases still resulted in convictions.

The other thing that is not told about Federal court is that over 90 percent of all dispositions are on pleas of guilty where the parties have waived any evidentiary attack.

There can be no showing, empirically or otherwise, that there is some connection between the exclusionary rule and apprehensions by police and/or causes of crime.

The last two legislative proposals that I have, very briefly, are for additional reform. Instead of trying to restrict a rule that has already been greatly limited by the Supreme Court, I would try to make some of the alternatives viable.

First, I would suggest that you authorize by the civil rights statute or the Criminal Justice Act an amendment that would permit the court to appoint counsel if reasonable cause is shown that Federal police conducted an unlawful search.

Second, the special prosecutor statute should be expanded to permit the court to appoint counsel that would go forward in the same fashion as the U.S. attorney to enforce the same criminal statutes Mark Felt violated.

Prosecutorial independence and objectivity, especially if Congress considers the "good-faith exception" will be necessary to enforce existing remedies for fourth amendment violations.

Thank you, sir.

Senator DeCONCINI. Thank you very much. Mr. Lerner.

Mr. LERNER. Thank you, Senator DeConcini.

I wish to thank the committee for giving me this opportunity to be here today.

I have a written statement which, with your permission, I would like to have made a part of the record at the conclusion of my testimony.

Senator DeCONCINI. Your statement is already included in the record.

Mr. LERNER. Thank you.

My name is Benjamin Lerner. I am a Philadelphia lawyer, for whatever that is worth.

I am also the head of the Defender Association of Philadelphia, which is an organization of approximately 110 public defenders who represent about 70 percent of the defendants tried every year in the criminal courts in Philadelphia.

I am appearing here today on behalf of the National Legal Aid and Defender Association, of which I am the president-elect. NLADA is an organization which represents the interests of public defenders, legal service lawyers and their clients throughout the country.

I have been the chief defender in Philadelphia for the last 7 years. Prior to that, for almost 2 years, I was a deputy attorney general and chief of the Office of Criminal Law of the Pennsylvania Department of Justice. In that capacity I represented and coun-

seled the Pennsylvania State Police, the Bureau of Corrections and the State Parole Board.

I also supervised the Justice Department's own criminal investigation staff and served as an administration resource for the State legislature and also for many district attorneys and police departments in some of the smaller counties in Pennsylvania.

I say that not because I think it makes me a particularly impressive person, but because I think that it shows that I have some perspective on both sides of the criminal justice aisle. And I think that perspective puts me in a good position to offer some comments on the proposed legislation involving the exclusionary rule.

Before I get to some specific comments about these three pieces of legislation, however, I would like to make two general observations about this legislation.

First, it seems to me that these proposals come from the assumption that somehow if we change the rules of our criminal justice system we will be able to effect a substantial decrease in the terrible, admittedly terrible problem of violent crime that is plaguing our country.

With all due respect, I think that just simply is not the case. In the first place, we know that most acts of crime in our country do not involve the criminal justice system at all because they do not result in an arrest. Indeed, most of them do not even result in a report to the local or State police department.

In fact, when one looks at the statistics of the criminal justice system's part in this whole area of national life, particularly the statistics on guilty pleas and on convictions in the cases that are brought to the attention of the district attorney and do get to court, I think it could be said that based on the overwhelming percentage of convictions it is the criminal justice system that is fulfilling its role to a much greater extent than almost any other organization in dealing with the problem of crime.

Tinkering with that system in any way, I believe, is not going to reduce the amount of crime we have in this country. No program that we can come up with that does not deal reasonably and realistically and forcefully once and for all with the causes of crime is going to effect that kind of change in the crime rate in this country.

Second, proposals such as the ones that we are considering today are proposals which, in effect, say to the people of this country: Look, we can change the rules of this system. This is all a big game and we can change the rules of the game and make the system work better for you, the honest law abiding people in this country.

Well, this isn't a game we are talking about, particularly when we are talking about the fourth amendment and the exclusionary rule.

This committee has already heard a substantial amount of testimony from sources much more scholarly than I am about the constitutional nature of the exclusionary rule. I have referred to some of that testimony in my written statement and I do not want to belabor that point now. But I think that it is impossible to fairly read the decisions of the Supreme Court of the United States, going back to *Weeks*, and all the way up through *Mapp* and *Ker v. California*, and not conclude that the exclusionary rule is part of the

fourth amendment. It is constitutionally based, and it simply cannot be changed simply by the will of the Congress through a simple piece of legislation.

Obviously this is not the only area in which Congress is being asked now to change the Constitution or to limit the jurisdiction of the Supreme Court so that courts will not be able to rule on the constitutionality of legislation which is now politically popular.

In times of economic and social stress, such as this, requests to change the Constitution by legislation, to restrict the jurisdiction of the courts which are charged with the responsibility of interpreting legislation in the light of the Constitution, are quite familiar in this country. I think, however, that in times like these we have to remember that such provisions are in the Constitution precisely because they were intended to be isolated from temporary shifts in public policy or political power.

Let me turn now for a moment to the bills in question.

Two of them, S. 101 and S. 1995 I think it is, would not on their face abolish the exclusionary rule entirely. Instead they propose to substitute standards such as "good faith," "intentional misconduct," "reasonable belief," et cetera, and provide that unless some of those elements or one of those elements is found to be present, the fruits of a particular search or seizure would not be deemed inadmissible even though that search or seizure violated the fourth amendment.

The other bill that we are considering is a bill which would indeed totally nullify or abolish the exclusionary rule and substitute for it a civil remedy which we have had for a long time and whose ineffectiveness has been proven from coast to coast throughout this country, and a disciplinary procedure which is interesting primarily because there is absolutely nothing in the law now, in State or Federal law, of which I am aware, that would prohibit police departments all over the country from having adopted disciplinary procedure such as this and from having utilized them.

The fact that there are such procedures in some police departments but not in others, and the fact that these procedures have been uniformly ineffective in providing any kind of punishment or deterrence against police officers whose conduct violates citizen's constitutional rights, is, I am afraid, the best answer that can be given to those who suggest that these kinds of procedures provide an adequate substitute for the exclusionary rule.

However, we are told that if we do away with the exclusionary rule public confidence in law enforcement will be restored and, even more important, public confidence in our courts will be restored.

We are told additionally that the people do not understand how come we have these technical rules which allow reams and reams of guilty defendants to go free.

Well, with all due respect, my response to that is that this is a tremendous misperception of what the exclusionary rule is, where its roots are and what it is supposed to do.

First of all, it is incorrect to suggest, that the exclusionary rule has resulted in an avalanche of reversals of criminal convictions throughout the country or that it is responsible for guilty defendants going free by the dozens, by the hundreds, by the thousands,

in any of our courts. Although it is true that the General Accounting Office survey of exclusionary rule-related acquittals, to which all of us have referred at one time or another, is limited to a study of Federal courts, those of us who have practiced criminal law in the State courts know that prosecutors rarely lose cases because of the exclusionary rule. Judges are not sitting on the bench looking for ways to trap unwary police or prosecutors into admissions of constitutional violation. In fact, the contrary is true.

Notwithstanding the basic theory of our criminal justice system, those of us who represent the poor, and particularly those of us who represent minorities, know that in situation after situation, in court after court, it is the defendant who bears the burden of proof if he wants to walk out of that courtroom a free man, regardless of what the theory is. And that is even truer when the issue before the court is a suppression motion.

Judges simply are bending over backward now not to grant suppression motions. It is not true—and no study would show—that the exclusionary rule provides a means by which many defendants walk out of courtrooms.

Second, it is simply folly, with all due respect, to suggest that the exclusionary rule can continue to be effective at all with modifications for good-faith exceptions, intentional misconduct, et cetera. Anybody who believes in that must believe in the tooth fairy.

As I have already indicated it is hard enough now to get judges, to grant motions to suppress. If in order to grant such a motion the judge would have to read a police officer's mind, find that he did not act in good faith or find that his misconduct was intentional, the exclusionary rule would absolutely cease to be a factor in American criminal courtrooms.

It is said, however, that the exclusionary rule hasn't worked; that it does not deter unlawful police conduct.

My response to that is that one need only compare the facts of preexclusionary rule cases to the facts of cases which are being litigated today.

Cases such as *Irvine v. California* and *Rochin v. California*, decided in the 1950's, provide examples of the most grievous forms of police conduct: A month long warrantless wiretap of a defendant's house; the insertion of a tube into a defendant's stomach against his will to force him to vomit up capsules which would later be used in evidence against him. This is the kind of police conduct which we saw prior to the application of the exclusionary rule to State criminal cases.

Now, it is true that there are still fourth-amendment motions being filed all over the country, and there will be as long as we have an adversary system. But it seems to me that one cannot look at the facts that are being litigated today, compare them with the facts of those earlier cases, and say that the exclusionary rule has not had a very favorable effect on police conduct throughout this country.

Finally, I want to make it clear that even as a defender I can understand the desire on the part of people in this country to do something, do anything, about the crime problem that we now face. But we simply cannot do anything effective about this problem simply by rewriting the Constitution.

These basic constitutional rights have served us well for 200 years. We should not tamper with them under the pretext of changing "the rules of the game" by which our criminal courts operate.

Thank you.

Senator GRASSLEY [presiding]. Mr. Treanor, would you proceed, please.

Mr. TREANOR. Thank you.

Mr. Chairman, I would like to express my appreciation for the honor the committee does me by permitting me to appear today before the committee on behalf of the National Association of Criminal Defense Lawyers.

My association is opposed to the abrogation or limitation of the exclusionary rule which precludes the admissibility of evidence seized in violation of the Constitution. The rule is by case law incorporated into the 4th and 14th amendments to the Constitution, and is therefore beyond the permissible scope of legislative enactment. Further, as a practical and historical matter, the rule has vindicated the substantive rights granted by the Constitution with negligible negative effect on the efficiency of the Federal criminal justice system. Indeed, a byproduct of the rule has been improved law enforcement standards, training, and performance.

With respect, Mr. Chairman, S. 101 is facially unconstitutional by virtue of abrogating the reasonableness standard of the fourth amendment. Additionally, a good-faith exception would swallow the rule and would create havoc with the factfinding process.

Similarly, S. 751, in addition to being facially unconstitutional, proposes an alternative tort remedy that encourages and rewards violations of the Constitution rather than deterring them.

The National Association of Criminal Defense Lawyers supports the retention of the exclusionary rule in the Federal courts and opposes the passage of the several proposed bills which would eliminate, abrogate, or limit the applicability of the exclusionary rule.

The Federal exclusionary rule as enunciated in *Weeks v. United States*, provides a remedy for violations of the fourth amendment by law enforcement officials. It subsequently has been extended to provide a remedy for violations of the 14th amendment. Careful reading of the Supreme Court cases reveals that the rule is an integral and essential part of the 4th and 14th amendments and, in that sense, proscribes Congress from revoking or rescinding that rule.

In addition to being a remedy for the violation of constitutional rights, the rule assures the integrity of the judicial system by preventing it from becoming a party to violations of the supreme law of the land. The legitimacy of all Government acts and organizations, including the criminal justice system was, for our Founding Fathers, and must be for us, grounded in the fairness of the relationship between the individual and the Government. This is especially so in the context of an adversary relationship as is demonstrated by the protections accorded to criminal defendants by the Constitution. The protection of the integrity of the courts insures not only fairness, but also the appearance of fairness.

The exclusionary rule, Mr. Chairman, has been vilified and blamed for handicapping the police by preventing them from effec-

tively fighting crime. This is erroneous both philosophically and factually. Insofar as the police are restrained from breaking the law of the land, this is not done by the rule, but by the Constitution itself. The rule by definition has no substantive content, and sets no standards of conduct for the Government. It is more correctly the active manifestation of the commands of our most basic law.

Proposed good-faith exceptions to the exclusionary rule would effectively debilitate the rule as a deterrent. Such exceptions necessitate inquiry into the state of mind of the officers or officials involved. State of mind is ephemeral at best, but a good-faith exception would further obfuscate it as it rewards ignorance. Not knowing the law or the facts would become a premium. It would further undermine training and educational efforts with police agencies. To know and disobey would be punished while not to know would be rewarded.

With just these concerns in mind, the Supreme Court has for over 100 years steadfastly rejected subjective good-faith tests. The line of cases rejecting such tests began with *Stacey v. Emery*, and is best expressed by the Court in *Beck v. Ohio*, previously referred to by Mr. Cleary, wherein Justice Potter Stewart wrote:

If subjective good faith alone was the test, the protections of the fourth amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.

Finally, Mr. Chairman, it would seem as a matter of logic and symmetry that if a standard of subjective good-faith were to be adopted, we should also adopt the same standard for others accused of crimes. If governmental officials can violate the law in good faith, then good faith should also be instituted as an affirmative defense and ignorance of the law be asserted to shield the conduct of those accused of breaking the law. The effects of such an enactment would be similar to the effects of a good-faith exception to the exclusionary rule; that is, it would make a mockery of the factfinding process.

We have in our history declined to ask juries to make judgments based on such subjective evidence and we should decline to do so when the conduct of Government officials is likewise being examined.

Thank you, Mr. Chairman.

I have prepared a lengthy, or more lengthy, and I hope complete statement and I would ask that it might be included in the record of this hearing.

Senator GRASSLEY. There is no problem putting it in the record. As a matter of fact, I understand it has already been included in the record.

Mr. TREANOR. Thank you.

Senator GRASSLEY. I have two questions that I would like to ask for the chairman, Senator Mathias.

The first one deals with a statement that was submitted to the task force in support of the exclusionary rule by the ABA. They stated, and I quote, and I am asking you to comment on this:

To say that the Federal exclusionary rule has not worked is to ignore experience. It has contributed to substantial law reform by federal authorities. It has increased

the professionalism of Federal law enforcement officers. It has vastly enhanced the integrity of the Federal judiciary process.

Since you are so familiar with this rule as it is applied in Federal courts, I would like to have you comment on that statement.

Mr. TREANOR. Well, I would subscribe to that statement 100 percent, Mr. Chairman.

Mr. LERNER. Mr. Chairman, I think there are two things that support that statement particularly.

First, I referred to in my own testimony. And that is if one looks at the facts of the fourth amendment cases decided before the exclusionary rule came into effect and compares those with the facts of cases under the exclusionary rule since its inception, one can see that police practices in this country have been substantially improved merely by looking at the kinds of things defense lawyers are complaining about.

Second, as a person who at one point in his life had something to do with training law enforcement officers, I know that the existence of the exclusionary rule resulted in more training, in better training, and in more concern on the part of the law enforcement officers that they have constitutionally sufficient information before they acted.

And I think Attorney General Sax's testimony bears out that point substantially.

Mr. CLEARY. John Cleary, Federal defender.

I think that it reaches a much more fundamental issue in support of the ABA statement. Too often police officers are told that "anything goes to put the bad guy away." Our system of Government embodies morality. That is to say the end does not justify the means. This principle is on a philosophical plane.

The second aspect is pragmatic. If we set high standards for professional law enforcement and insist upon their compliance, we will get better police forces. If, on the other hand, we set "as low as you can go" standards, we will get what we asked for.

Senator GRASSLEY. Thank you.

Senator Mathias also wants you to respond to these two contentions:

That the exclusionary rule has been attacked as irrational for a number of reasons, including:

One, the rule only works to benefit those who have committed criminal acts; is of no benefit to the innocent victims of searches, and

Two, the rule applies regardless of either the gravity of the offense charged or the degree of official misconduct.

Mr. LERNER. First of all, the rule works, as any constitutional rule does, to everybody's benefit. It is absolutely clear that a constitutional rule which requires the police to obey the fourth amendment before they take certain actions is going to benefit all of its citizens, even if we only see the challenges to alleged violations of the rule in criminal cases.

One of the purposes behind the rule is the deterrence of unlawful police conduct. The rule has worked in that regard. It has led to better police officers through better training and more sensitivity to the rights of all of our citizens.

Justice Frankfurter once wrote that one of the geniuses of our constitutional system is that we are willing to test our basic constitutional principles in cases that frequently involved the least socially desirable members of our society. That is, persons charged with serious criminal offenses. I think that the existence of the exclusionary rule is a good example of that precept.

Senator GRASSLEY: Do either one of you other gentlemen want to comment?

Mr. TREANOR: I would simply say, Mr. Chairman, that the purpose and the effect of the exclusionary rule have been to protect any citizen, not only a citizen accused, but a citizen who is potentially to be accused. And, therefore, I will reject the assertion that it goes to more greatly protect those who are guilty and accused as opposed to those who are innocent and accused.

With regard to the fact that the exclusionary rule does not address the question of the degree of police misconduct, I suggest that ignores the purpose, of the exclusionary rule. And that is to prohibit the use of evidence which has been obtained by illegal means.

I further suggest that there is no need, therefore, to give degrees to the level of illegality.

Mr. CLEARY. Just briefly, Senator.

First, I think of the Biblical exhortation of whatever is done to the least of anyone is done onto me.

Now, unfortunately, in our society we do not associate ourselves with an accused person, even though recently the Senate had to deal with one of its Members that wound up in that luckless position.

Second, and a more important aspect, is that when you see the criminal justice system function you understand what we mean by checks and balances: The Executive versus the Congress versus the judiciary.

The judges do not like to criticize a coordinate and equal branch of Government. So, the criminal case allows a moral exhortation for the police, shape up, but it does not require the judge to take any action.

The classic example you are aware of is the *United States vs. Payner*, the case where the outrageous search by the IRS—literally a burglary and photographing of documents in a briefcase; conduct that was clearly criminal—the court said we cannot suppress that evidence because the person has no standing. But we leave it up to that other branch of Government, the executive, to do something about it.

So, I think that the judges are acting with judicial restraint. They are not dictating to law enforcement that they comply with the Constitution, but say within our limited sphere we cannot allow this impermissible evidence to be used.

Senator GRASSLEY. That concludes the questions Senator Mathias had for the present time, but I think as a matter of normal procedure, there will be some additional questions in writing. And there may be other questions from the members of the subcommittee as well. So, we would appreciate prompt responses to the questions that are submitted in writing.

[The prepared statements of Messrs. Cleary, Lerner, and Treanor follow:]

PREPARED STATEMENT OF JOHN J. CLEARY

SUMMARY

The two bills S. 101 and 751 are an unnecessary challenge to the Fourth Amendment exclusionary rule. The exclusionary rule promulgated by the Supreme Court has been in effect in the federal courts almost 70 years. In recent years the Supreme Court has cut back in the persons who can seek relief and limited the rule to criminal trials. The federal criminal justice system is different from the state, and the need for the legislative intervention has not been established. The "good faith" exception makes police officer ignorance a virtue. Something should be done to counter the existing impression that the system now countenances police perjury. Existing alternatives to the rule are not viable, and Congress might first seek to shore up civil remedies by providing for paid counsel to sue offending officers (who have government-paid lawyers defend them). Congress might also create special prosecutors to enforce the criminal laws proscribing unlawful searches and seizures.

OF TYRANNY

There are two sorts of tyranny; the one real, which arises from the oppressions of government; the other is seated in opinion, and is sure to be felt whenever those who govern, establish things shocking to the turn of thought, and inconsistent with the ideas of a nation.

Montesquieu, The Spirit of Laws
(1748)

Introduction

There are 32 federal public defenders and seven federal community defender organizations, a total of 39 federal defenders, who provide representation for the criminally accused in federal court who are financially unable to employ counsel. Approximately 70% of those charged with a serious federal crime are unable to retain their own attorneys, and federal defenders represent approximately one-half of this number.^{1/} Federal defenders are restricted solely to federal criminal cases, and provide representation in a fashion similar

^{1/}

The Sixth Amendment right to the effective assistance of counsel is implemented by the Criminal Justice Act (18 U.S.C. § 3006A).

to retained or individually appointed counsel. ^{2/} With day-to-day exposure to federal criminal practice federal defenders have a "trench-level" perspective of how the exclusionary rule works in federal courts, which is the unique concern of S. 101 and S. 751.

Proposed Legislation

S. 101 (Deconcini) is a not-so-subtle attempt through erosion to eliminate the exclusionary rule. This bill, with tongue-in-cheek recognition of the exclusionary rule, would excuse all violations unless they were "intentional or substantial." Most have recognized this as a flank attack on the exclusionary rule by creating the "good faith" exception in which police ignorance would rise to the level of virtue. S. 751 (Hatch-Thurmond) is a frontal assault seeking straightforward abolition of the exclusionary rule (proposing a federal statute, 18 U.S.C. § 3501) that would permit admissibility of evidence even if obtained in violation of the Fourth Amendment. ^{3/} S. 751 also offers a "new" tort remedy that would preclude punitive damages for anyone convicted of anything (i.e. resisting arrest), but in any event there is a maximum of \$25,000. This statutory tort remedy in effect limits the statutory and common law remedies now available, and under this "new statutory cause of action" removes the objective determination of a police wrong from the jury to a judge. ^{4/} The recognition that administrative discipline for constitutional wrongs by police officers is a good thing. It says nothing more to statutorily sanctify an already existing atrophied police management tool. The provision for attorneys fees, if a party prevails, does little to encourage attorneys to accept these cases that would be cited solely by judges when there will be controverted evidence presented both by the plaintiff and the defendant federal officers.

Foundation, Development, and Erosion of the Fourth Amendment

In 1914, the Supreme Court in the exercise of its supervisory authority over federal courts fashioned the exclusionary rule to implement the Fourth Amendment in Weeks v. United States, 232 U.S. 383, which announced that evidence seized by federal officers in violation of the Fourth

^{2/} There is no distinction between appointed and retained counsel in the sense of professional responsibility, and that holds true for federal defenders. Ferri v. Ackerman, 444 U.S. 193 (1979). See also Polk County v. Dodson, 102 S.Ct. 445 (1981).

^{3/} The subordination of the constitution to statute, making the Fourth Amendment inferior to a Congressional statute, has already been achieved by the Supreme Court. Evidence seized in violation of the federal wiretap laws is not admissible before a grand jury. [Gelbard v. United States, 408 U.S. 41 (1972)], but evidence seized in violation of the Fourth Amendment is. [United States v. Calandra, 414 U.S. 338 (1974)].

^{4/} Under existing case law, Carlson v. Green, 446 U.S. 14 (1980), the aggrieved party has both a cause of action against the Government and the individual officer. There is no limit on the damages that may be obtained against the Government, and against the individual officer he has a right to trial by jury and may seek punitive damages.

Amendment's prohibition against unreasonable searches and seizures would not be used in a federal criminal case. The Supreme Court did not apply the rule to state cases, for the Fourteenth Amendment Due Process Clause was sufficient only to protect the fundamental right of privacy but not to require application of the exclusionary rule in state criminal proceedings. Wolf v. Colorado, 338 U.S. 25 (1949). The exclusionary rule was held not to be an essential component of the right of privacy guaranteed by the Fourth Amendment, but simply a means of enforcing that right. The states were free under the Federal Constitution to accept or to reject it.

This unique situation in which the exclusionary rule of the Fourth Amendment was applicable to federal law enforcement officers but not to state law enforcement officers created such anomalies as the "silver platter doctrine," which permitted admissibility in a federal criminal proceeding of evidence illegally seized by state officers but not by federal officers. The federal courts finally refused to accept the unconstitutional actions of state officers, for when judges appear to become "accomplices in the willful disobedience of a Constitution they are sworn to uphold," we imperil the very foundation of our peoples' trust in their government on which our democracy rests. Elkins v. United States, 364 U.S. 206, 223 (1960).

Next in Mapp v. Ohio, 367 U.S. 643 (1961), the Supreme Court applied the federal exclusionary rule to all state criminal proceedings. Former Attorney General Tom Clark, who was a principal in the internment of Japanese Americans during World War II, was the author of the opinion. The "weighty testimony" of Justice Cardozo in People v. Defore, 150 N.E. 585, 589 (N.Y. 1926) ("the criminal is to go free because the constable had blundered."), was outweighed by the consideration of "the imperative of judicial integrity," for he said, "The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." He concluded:

Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity as necessary in the true administration of justice."^{5/}

In 1965, the exclusionary rule was held available to a state prisoner seeking federal habeas corpus post-conviction relief from his state conviction.^{6/} In Kaufman v. United States, 394 U.S. 217 (1969), a federal prisoner seeking post-conviction relief could use the exclusionary rule because a state prisoner had the right on federal post-conviction attack.

Ten years after Mapp, individual Supreme Court justices questioned the efficiency of the exclusionary

^{5/} Mapp v. Ohio, 367 U.S. 643, 653, 659, 660 (1961).

^{6/} Henry v. Mississippi, 379 U.S. 443, 452-453 (1965).

rule.^{7/} The first announced effort to curtail the exclusionary rule came in 1976, for state prisoners in a federal post-conviction proceeding could no longer challenge an unlawful search and seizure.^{8/} The Supreme Court has also recently undermined the rule by narrowly restricting those who may assert it.^{9/}

Several state supreme courts have not followed the federal retrogression and have sought to apply the rule in the context of its own state needs. That the state may protect the right of privacy at a level above minimum federal constitutional due process has been recognized both by the U.S. Supreme Court and state courts.^{10/} With the varying interpretations, i.e. the federal vis-a-vis state and state vis-a-vis state, it is much more appropriate to permit case development or modification of the rule, rather than casting in Congressional concrete an inflexible rule that may prove unworkable and unwise. The rule has slowly developed from a federal standard (1914) to a Constitutional standard (1961). Since 1969 the rule has by judicial fiat been narrowly construed as to limit it only to the criminal trial itself and to very few persons who are the direct objects of illegal

^{7/} Bivens v. Six Unnamed Federal Agents, 403 U.S. 388, 411 (1971) (dissenting opinion of Chief Justice Burger); Schneekloth v. Bustamonte, 412 U.S. 218, 250 (1973) (concurring opinion of Justice Powell); Cardwell v. Lewis, 417 U.S. 583, 596 (1974) (concurring opinion of Justice Powell); and Lefkowitz v. Newsome, 420 U.S. 283, 302 (1975) (dissenting opinion of Justice Powell).

^{8/} Stone v. Powell, 428 U.S. 465 (1976).

^{9/} The concept of "standing" to assert the rule has been confined to those who have an undeniable expectation of privacy in the thing searched or seized. Rakas v. Illinois, 439 U.S. 128 (1978) (being on the premises not sufficient); United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980) (person accused of possessing contraband did not have standing); United States v. Payner, 447 U.S. 727 (1980) (an egregious theft of a briefcase engineered by government agents did not warrant suppression because it was not the defendant's).

^{10/} See Cooper v. California, 386 U.S. 58, 62 (1967); Sibron v. New York, 392 U.S. 40, 60-61 (1968); State v. Grijalva, 533 P.2d 533 (Ariz. 1975); People v. Brisendine, 531 P.2d (Cal. 1975); People v. Hoinville, 533 P.2d 777 (Colo. 1976); State v. Kaluna, 520 P.2d 51 (Hawaii 1974) [state supreme court refused to be bound by United States v. Robinson, 414 U.S. 218 (1973); and Gustafson v. Florida, 414 U.S. 260 (1973)]; State v. Opperman, 247 N.W.2d 673 (S.D. 1976) (state supreme court differed with U.S. Supreme Court's holding in South Dakota v. Opperman, 428 U.S. 364 (1976), and held that the state constitution was violated even though U.S. Constitution was not); State v. Sawyer, 571 P.2d 1131 (Mont. 1977); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (search warrant for the premises of a non-suspect attorney's office held invalid, and the court rested its decision not only on the United States Constitution (Fourth Amendment) but also on the Minnesota Constitution).

police behavior. The empirical justification either for or against the rule has not been established, but the confidence of the people in an historic Constitutional right and the accountability of the police in some forum must be preserved.

Purposes of the Exclusionary Rule

The characterization of the exclusionary rule as a judicially fashioned device to deter future unlawful police conduct does not adequately state its basis, but is only one limited objective of the rule. A complete review of judicial precedents offers sounder and more practical reasons beyond police deterrence, which is moral rather than actual. These judicially recognized purposes of the rule include:

A. Self-Executing Rule of Law. The exclusionary rule implements the Fourth Amendment. In Weeks v. United States, 232 U.S. 383 (1914), the Court held that if the protection of the citizen was not respected by declaring the evidence inadmissible the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. 383, 393. Justice Oliver Wendell Holmes, in rejecting evidence derived from an illegal search, said that to do otherwise "reduces the Fourth Amendment to a form of words." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

B. Judicial Morality--Imperative of Judicial Integrity. The exclusionary rule insulates the judiciary from participation in violations of the Fourth Amendment. Again in Weeks the Court stated: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. 383, 394. Evidence is an integral part of the judicial proceeding, and a judge sworn to uphold the Constitution morally and legally ratifies the misconduct of the officers as his own by regularly using its fruits. Recently some judges by circular reasoning have criticized the inconsistencies of this rule because courts in the last 20 years have created exceptions to it (i.e. use of illegal evidence in the grand jury, limited standing). Modern judicial analysis has given more weight to the practical needs of law enforcement without a full appreciation of the surrender of judicial neutrality. The preference being given to the needs of the Executive is bound to lessen the independence of the judiciary.

C. Fundamental Protection of Rights of Privacy. The exclusionary rule generally protects the right of privacy of all citizens, accused or not. The primary object of the Fourth Amendment is the right of privacy--"indefeasible right of personal liberty and private property," quoted from Entick v. Carrington, and cited in Weeks v. United States, 232 U.S. 383, 391. The worth and dignity of each citizen must be scrupulously respected by government agents. Each citizen has some zone of personal control beyond overreaching Government. Governmental acknowledgement of this personal protection makes the citizen equal in right to the state. To deny the right of privacy makes the citizen the subordinate of the state. The Fourth Amendment protects people, not places.^{11/} The criminal trial is a social focal point for all to see if

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Katz v. United States, 388 U.S. 347, 351 (1967); Ybarra v. Illinois, 444 U.S. 85 (1979); Rawlings v. Kentucky, 448 U.S. 98 (1980).

Government is restrained by the Constitution. What happens to the accused is a lesson for all of us.

D. Deterrence of Unlawful Police Conduct. The cliché most offered is that the prospective deterrence of law enforcement officers, but this is an oversimplification. It is an obvious extension of the rule that no person, even a government officer, is above the law. The exclusionary rule was forged in response to cumulative police disrespect of the constitutional limitations on their power. Their repeated breaches of the Constitutional right of privacy could not be treated as mere "technical" violations. Such conduct was not adequately sanctioned by pious ineffective judicial pronouncements that the police conduct was wrong but the evidence admissible. By the exclusionary rule the courts tell the police to "shape up" and abandon their immoral practice of using any means to obtain a criminal conviction. Judicial review in the context of a criminal case may disapprove police misconduct but not punish it. The delicate inter-governmental balance, the hallowed concept of checks and balances, permits the courts to ask for police compliance with the Constitution but does not force it. Courts are loathe to find governmental misconduct save in rare instances. If the police are concerned with successful prosecutions--that they perceive themselves as enforcers of the law, including the Constitution, then the infrequent and rare suppression of evidence is a subdued exhortation to rise to a level of professionalism expected of competent officers. If this atypical mild chastisement is abolished, the police then know that their conduct is above scrutiny, for Congressional abolition of the exclusionary rule is sub silentio approval of their pragmatic amoral principle: Do whatever is necessary to put the "bad guys" in jail. More politely this is called "the end justifies the means." The courts as the final protectors of the Constitution have the duty to motivate police respect for the Fourth Amendment.

E. Public Respect for Government. The exclusionary rule is designed to ensure public confidence that government officials do obey the commands of the Constitution. The public must believe that the police are subordinate to the law and that more than lip service is paid to the Constitution. The ability of the police to function is controlled by community respect. If the police do not respect the law, the public will not respect the police. The oft-quoted statement of Justice Brandeis in his dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928), expresses this important purpose:

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face."

Those seeking to eliminate the personal accountability of the officer for unconstitutional violations are restructuring our society by placing the policeman "above the law." To insulate erring policemen from personal

accountability in the courts runs counter to our system of checks and balances--and diffusion of power.

Alternatives to the Exclusionary Rule

Many alternatives to the exclusionary rule already exist, but none have been effective. These theoretical remedies have produced no demonstrable effect on curbing unlawful police conduct. Congress, however, now proposes to immunize individual federal agents from their misconduct. Because the Federal Government has provided substantial funds to retain private attorneys for federal officers charged with illegal searches, the Government now wishes to insulate itself (permit only limited actions against the United States for money damages to save the cost of attorneys fees and limit awards of damages) and immunize the officers. Little redress is now available, but even that is too much.

Existing remedies for illegal searches other than the exclusionary rule include:

A. Criminal Actions. Both state and federal authorities have statutes which provide substantial criminal sanctions, including long-term confinement, for those who violate the civil rights of persons.^{12/} The enforcement of these statutory penalties against law enforcement officers are rare, for prosecutors, dependent upon the investigative work of law enforcement officers, would have to suffer the alienation of such a criminal action. When criminal prosecutions have been instituted for egregious wrongdoing on the part of federal agents, they have not been successful. Even the prosecutors who try such cases are aware that a conviction is most difficult to obtain. In November 1980, a federal prosecutor in a criminal action against former FBI officials in closing argument asked the jury to let the Constitution ring out loud and clear, and the agents were convicted. In early 1981, these two former FBI officials who received only a nominal fine, were pardoned by President Reagan.^{13/}

B. Criminal Contempt. Dean Wigmore in his treatise on evidence [Wigmore, 8 Evidence § 2184 (3d ed., 1940)] suggested a rather oversimplified solution. In essence, if the officer violated the constitutional rights of the defendant in seizing evidence, the defendant should be found guilty, and the court should then impose summary contempt and sentence the officer to 30 days in jail "for his contempt of the Constitution." Although the judge might be able to theoretically impose such sanctions, judicial courageousness has not yet reached that level in the enthusiastic enforcement of the Fourth Amendment. Although the desire exists to punish the defendant, no such equal desire exists to punish the law enforcement officer for constitutional malfeasance.

^{12/} Cf., 18 U.S.C. §§ 241, 242.

^{13/} U.S. v. Mark Felt and Edward Miller, Crim. No. 78-179 (D.D.C.) in which both defendants were charged with civil rights violations, 18 U.S.C. 241, and found guilty on 6 November 1980. On 15 December 1980, each was sentenced, and the case was appealed. On 26 March 1981, President Reagan pardoned each, but the criminal appeal is still pending because the outcome may affect civil liability.

C. Internal Discipline by Police Administrative Authorities. The police often suggest that police review boards (with all police management personnel) and other administrative review mechanisms within the law enforcement apparatus may take appropriate action against the officer who overreaches and violates the constitutional prohibition against unlawful searches and seizures. The obvious conflict of the police authority encouraging the officers to make apprehensions of violators while at the same time circumscribing their zealotness is almost unresolvable. Too often the police officers conducting the review of such alleged disciplinary wrongdoings might implicitly and understandably apply the adage of St. Paul that "There but for the grace of God go I." One federal legislative proposal would allow the aggrieved person to participate in the internal administrative proceeding, but although an improvement, it still does not indicate the outcome would be any different. Chicago Police Detective Jack Muller got into trouble for his comments about the Chicago Police Department's Internal Inspection Division (IID). He said: "The IID is like a great big washing machine. Everything they put into it comes out clean."^{14/}

D. Civil Actions. State and federal statutes, as well as common law remedies, exist to prosecute the officer for violation of civil or constitutional rights. Federal law permits an action for money damages against a state police officer for an unlawful arrest and search (42 U.S.C. § 1983). In Monroe v. Pape, 365 U.S. 157 (1961), the police officer claimed his alleged wrongful action was not "under color of law" and not covered by 42 U.S.C. § 1983, the Ku Klux Act of 1871 protecting civil rights of citizens. This argument was rejected. Since 1971 a similar action for money damages against federal agents may be brought.^{15/} To enforce these actions, attorneys are essential, but few attorneys would take such cases on the basis of contingent fees. The costs in such litigation are substantial, for the law enforcement officers will often have representation provided at public expense. When sued, government with almost inexhaustible resources may make the litigation most onerous, protracted, and costly. Knowledgeable witnesses are reluctant to testify against police officers, and juries are averse to find liability or award damages, where the plaintiff has been found guilty of some crime.

E. Action Against the Government. In the past, sovereign immunity was available to the government who employed the wrongdoing officer. As a result of the Collinsville, Illinois, drug raids by federal law enforcement of innocent persons' houses, the Federal Tort Claims Act was amended to provide an action for money damages against the United States "with regard to acts or omissions of investigative law enforcement officers of the United States Government . . . [for] any claim arising, on or after the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution."^{16/} For the offending state police officer, an action against the

^{14/} Muller v. Conlisk, 429 F.2d 901, 902 (7th Cir. 1970).

^{15/} Bivens v. Six Unnamed Federal Agents, 403 U.S. 388 (1971). The proposed legislation (S. 751) would not affect civil rights suits against state law enforcement officers, but only federal officers.

^{16/} Pub.L. 93-253; 28 U.S.C. § 2680(h).

municipality for a violation of federal civil rights was recently made possible.^{17/} The municipality or state may not assert the good faith of its officers as a defense, but that defense may still be asserted by the individual officer.^{18/} Legislative actions, such as S. 751, thought to expand privacy rights may actually contract the remedy. Congress to protect news and school rooms from searches passed the Privacy Protection Act of 1980^{19/} which erased the right to jury trial against an offending federal agent.^{20/}

Until remedies are made viable, they cannot be considered efficacious alternatives to the exclusionary rule. Those who strongly encourage the use of alternatives forget that they are now suggesting a procedure that will proliferate controversy with the institution of administrative and other civil litigation lacking both the ultimate fairness and quick efficiency of the immediate relief granted in a criminal case. The eroded and limited exclusionary rule, under the Supreme Court's recent interpretations which give much deference to the difficulties of the line police officer, is applied by a trial judiciary sensitive to the needs of law enforcement with the result that relief is rarely granted. Those offering substitutes seek to provide no remedy at all.

The Adversary System and the Rules of Evidence

Because of an alleged imbalance or disadvantage, law enforcement advocates seek novel constitutional amendments that not only reflect a misapprehension of the problem presented, but also challenge and undermines the very nature of the adversary system. In a criminal proceeding, both parties are considered as equal, but the resources and predominance of the Government far exceed that of any individual criminal defendant, most of whom cannot afford an attorney. The courts, to ensure a fair and just disposition of the case, must enforce rules of law that regulate the admissibility and inadmissibility of evidence.

Federal trial courts ^{21/}, under the principles of evidence formulated by a Judicial Conference Committee and ratified after much revision by Congress in 1975, do not accept

^{17/} Monell v. Department of Social Services, 436 U.S. 658 (1978), overruling to that extent Monroe v. Pape, 365 U.S. 157 (1961), which had insulated the municipal government.

^{18/} Owen v. City of Independence, 445 U.S. 622 (1980).

^{19/} Pub.L. 96-440, 94 Stat. 1879 (13 Oct. 80); 42 U.S.C. § 2000aa.

^{20/} In Carlson v. Green, 446 U.S. 14 (1980), in addition to the Federal Tort claims Act cause of action (tried by a judge alone), the plaintiff seeking redress against the federal officer directly was entitled to trial by jury. The legislative history of the Privacy Protection Act of 1980 explicitly reveals the Congressional intent to overrule Carlson v. Green.

^{21/} Congress may "constitute tribunals inferior to the Supreme Court" (U.S. Constitution, art. I, sec. 8, cl. 9), but it should not use that as a basis to overturn the Fourth Amendment as interpreted by the Supreme Court.

all evidence ("the truth"). Policy reasons limit self-evident truth. The individual has certain inalienable rights, express and implied in the Constitution, that must be respected by the government. Ours is not a totalitarian state. For example, should a truthful confession obtained by torture be admissible?^{22/}

Hearsay evidence, although its accuracy might not be challenged, is inadmissible because of the defendant's right to confront his accusers and society's interest in obtaining information first-hand. The rules need an enforcement mechanism, and one of the basics is the exclusion of evidence. Exclusion may be derived from constitutional provision, a statute, or even a court rule, but most often it depends upon the discretion of the trial judge in applying the rule to the facts. Under the Congressionally approved Rules of Evidence, the district judge has broad discretion to exclude (1) improper confessions (Rule 104(c)), (2) irrelevant evidence and evidence contrary to the Constitution, statute, or court rule (Rule 402), probative evidence outweighed by prejudice (Rule 403), crimes or misconduct offered as proof of bad character (Rule 404(b)), admissions made during plea negotiations (Rule 410), past sexual behavior of alleged victim (Rule 412), privileged statements (Rule 501), testimony of incompetent witnesses (Rule 601), prior convictions of defendant or witness (Rule 609), hearsay (Rule 802), and documentation without authentication (Rule 901). On this and many other evidentiary issues the federal trial judge, often unlike his state counterpart, is given broad discretion. Federal appellate courts give great deference to the judge who held the hearing, and if error is found, it will often be treated as harmless. With such broad guidelines on the admission of evidence generally, it would seem anomalous to accord special treatment to illegally seized evidence. Congressional intervention comes across more as political posturing to balance the scales of justice to favor the police. The federal courts may only influence those brought before them. The misinformed public does not understand that almost 90% of the dispositions in federal court are on pleas of guilty waiving any evidentiary challenge. When those charged are brought to court, the rules of evidence, including the exclusionary rule, come into play to achieve a fair and orderly presentation of the facts in a lawsuit between the Government and the accused. This rule has no connection with police apprehensions or the reasons for crime.

More public education about what the federal criminal justice system does and can do is a goal more in consonance with our form of government. The courts are easy targets, but most experienced defense lawyers would, if asked, contend that the majority of federal judges are pro-prosecution because of their institutional role as a government functionary. Those rulings excluding evidence are in the main for egregious misconduct. Because of the very limited judicial resources and a large criminal caseload, a symbiotic relationship exists between the judge and the prosecutor, even though judicial independence requires detachment and objectivity from the charging process. Often judges are heard speaking more of the number of cases disposed as a measure of performance rather than the quality of justice achieved between the parties.

The federal police advocates claimed many went "unwhipped of justice" because of this rule. Senator Kennedy,

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Brown v. Mississippi, 297 U.S. 278 (1936) (a confession obtained by torture is not admissible because of a violation of fundamental due process).

then Chairman of the U.S. Senate Judiciary Committee, requested a survey on the impact of the exclusionary rule in federal criminal cases. The results were startling. From the period 1 July through 31 August 1978, in 38 U.S. Attorney's Offices, 2804 defendant cases were evaluated. Of the filed motions to suppress evidence, over one-half dealt with Fourth Amendment issues.^{23/} Of the 2804 defendant cases, only 1.3% resulted in exclusion of evidence. Of those cases where the motion to suppress was granted in total or in part, 50% of the defendants were still convicted.^{24/}

Federal Criminal Caseload

The two Senate bills (101 and S. 751) address the exclusionary rule in the context of federal criminal proceedings. For the 12-month period ending 30 June 1980, the 95 district courts terminated 27,968 criminal cases involving 36,560 defendants. Federal jurisdiction is limited, and does not track the state jurisdictions which are the principal jurisdictions who exercise the police power (United States Constitution, Tenth Amendment). These 27,968 district court criminal cases included:^{25/}

<u>Nature of Offense</u>	<u>Percentage</u>
Homicide, robbery, assault, burglary	7.5
Larceny and theft	10.8
Embezzlement and fraud	22.2
Auto theft	1.4
Forgery and counterfeiting	7.6
Drug abuse--	11.2
marijuana	(2.4)
narcotics	(5.9)
controlled substances	(2.9)
Immigration	6.5
Weapons and firearms	3.3
Escape	3.0
Drunk driving, traffic	16.4
All others	10.0

^{23/} Others dealt with confessions, photographic and lineup identifications, and electronic surveillance.

^{24/} Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Comptroller General Report, 19 April 1979. Also, .4% of the cases in which the prosecution declined to go forward were declined due to Fourth Amendment search and seizure problems.

^{25/} Annual Report of the Director of the Administrative Office of the United States Courts, 275 (1980), (total does not come up to 100% due to rounding). Of the 27,968

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After studying the type of criminal cases in federal courts, Congress should reevaluate its need to intervene with Constitutionally suspect legislation. (S. 101 and S. 751).

The Good Faith Exception.

In Michigan v. Defillippo, 443 U.S. 31 (1979), the Supreme Court recognized a limited "good faith" exception for police officers. The defendant was arrested pursuant to a Constitutionally defective Detroit ordinance which allowed police officers to stop and detain those who refused to give identification. The police made the arrest of the defendant good faith reliance on the defective but seemingly valid ordinance, and the evidence seized as a product of that arrest was admissible. The decision in United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 101 S.Ct. 946 (1981), was obiter dicta, for the court found the suspect guilty of criminal contempt in being in a place not authorized by her appeal bond. At the time he arrested her, the police officer thought the defendant was guilty of "bail jumping" which was not technically correct.

There is a quantum leap between the Defillippo case and the Williams case. In Defillippo, the legislative body promulgated an ordinance that at the time of the arrest had not been judicially determined to be Constitutionally defective. The belief of the individual officer is not relevant to the existence of the ordinance, but in Williams the justification for arrest turned on the officer's belief that the conduct of the suspect was criminal. If a federal officer believed that a person committed the offense of hindering law enforcement (a non-existent federal offense) would the arrest have been reasonable? If the officer honestly believed that an individual committed the offense, but was in error as to an essential element, would that justify the unlawful arrest?

Arrests occur on the street; evidentiary hearings take place in the courtroom. The factual reconstruction of events depends upon the accuracy and authenticity of the testimony presented, and often 20-20 hindsight influences reconstruction. Clear-cut objective standards are necessary to test the propriety of the police officer's conduct, and the subjective "good faith" test of the police officer nullifies any judicial scrutiny. The court will be forced to accept the state of mind of the officer, right or wrong, ignorant or intelligent, precipitous or cautious. The danger of the "good faith" test to determine the propriety of the arrest in a criminal prosecution has been severely criticized.^{26/}

Justice Potter Stewart, recently retired from the Supreme Court, who did not join in the opinion in Mapp v. Ohio, which applied the exclusionary rule to the states, commented:

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cases, only 18,855 were felonies. Also, the records system does not include petty offenses (maximum penalty six months) filed before the magistrate. Immigration and traffic offenses on a federal enclave would probably be the largest categories of criminal offenses, but because these cases are before the magistrates they are not included.

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Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo.L.Jour. 365 (1981); Dejong, "The emerging good faith exception to the exclusionary rule," 57 Notre Dame Lawyer 112 (1981).

The criticism is best perhaps summed up in Justice Cardozo's aphorism that 'the constable blundered so the criminal goes free.' But those who support it say that it is the only effectively available way to enforce the provisions of the Fourth and Fourteenth Amendments, and to date that has been the view espoused by the Supreme Court of the United States. What its future may be, I don't know, but it seems to me that if one modifies the exclusionary rule and moves to this sort of good faith inquiry that other difficulties will arise which, foreseeably, will be just as difficult issues as are present now. What law enforcement officer is ever going to say that he deliberately and knowingly violated the Fourth and Fourteenth Amendments? So the test will have to be how egregious was the violation, and that in the end becomes something of a subjective test.^{27/}

The Defendant's Perspective: Police Perjury

Few motions to suppress are granted in federal court, but the defense bar does not generally accept punctilious conformity with constitutional requirements as the justifications for infrequent application of the exclusionary rule. Experienced police officers know what the legal requirements are and how they may be satisfied. A search warrant is not necessary if there are "exigent circumstances" or if the suspect "consents." If the officer is making an arrest and observes the contraband "in plain view" then he has a right to seize it.

Although courts hear regularly how defendants request the officers to open the trunk of the car where the contraband is found, the defendant often controverts this statement. To challenge the officer, the defendant must first testify. Although testimony given by a defendant at a suppression hearing cannot be used by the government in their case in chief, it may be used for purposes of impeachment. Defendants are reluctant to willingly incriminate themselves. Rarely will a defendant testify at a motion to suppress hearing because the wide-ranging inquiry at this preliminary hearing to determine the admissibility of evidence could severely undermine a valid defense. The audacious defendant who will testify participates in a credibility contest that he never wins. The judge, when having to choose between the testimony of "unbiased" law enforcement officer and the "self-serving" remarks of the defendant, will almost always believe the officer. Lawyers and police officers familiar with the federal criminal justice system know this, but the defendant, especially those unfamiliar with the workings of the system, are outraged by the distortion of the truth. Once the trial judge makes a factual finding as to credibility it is practically unreviewable, for it was only the trial judge who heard the testimony and weighed the demeanor of the witnesses. Even as to issues of law and fact, the trial judge may be reversed only if the ruling made in the district court was held "clearly erroneous." In essence, defense lawyers present arguments in which the police version of the events is accepted as true. If reviewing courts find a violation of the Fourth Amendment, many believe that police conduct does not change but only their subsequent testimony.

If police are expected to use certain formalistic language, then can it be called "perjury" if they feel that the system, by custom and tradition, expects such testimony? When a court of appeals judge, Chief Justice Burger stated: "It would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion."^{28/} In order to justify a search, police officer testimony may have degenerated to the level of defendants of old sentenced to death who would repeat a few words in Latin, part of a prayer, so as to gain the benefit of clergy." Although both acted for good ends--one to justify a search and the other to avoid the death penalty, there was something unethical or wrong about a system that permits repeated deviations from the truth. Much of the police concern for the abolition of the exclusionary rule is not its application but an honest desire to avoid a hypocritical justification of their conduct in court.

Interim Reform Proposals

Before Congress directly (S. 751) or indirectly (S. 101) abolishes the Fourth Amendment exclusionary rule, it should experiment with additional legislative devices to honestly implement civil remedies that would be available to any citizen, accused or not.

In the same fashion that attorneys may be appointed by the court to pursue civil rights discrimination suits ^{29/} Such a provision might provide:

Any person aggrieved by an unlawful search or arrest by a federal officer may apply to the district court for the appointment of counsel to pursue any civil or administrative remedies on behalf of that person. Appointment is discretionary with the district court or the United States magistrate, and counsel will be compensated at the same rates available for compensation under the Criminal Justice Act (18 U.S.C. § 3006A). If the person prevails in the administrative or civil proceeding and obtains as a part of the judgment or award attorney's fees, those fees would be used to reduce the funds paid to counsel pursuant to this section.

This addition could be made either to the Criminal Justice Act (18 U.S.C. § 3006A) or to the Civil Rights Attorney Fees Awards Act (42 U.S.C. § 1988).^{30/}

Federal prosecutors with some difficulties can institute federal criminal proceedings against state police

^{28/} Bush v. United States, 375 F.2d, 602, 604 (D.C. Cir. 1967). See also Sevilla, "The Exclusionary Rule and Police Perjury," 11 San Diego L.Rev. 839 (1974).

^{29/} 42 U.S.C. § 2000e-5(f)(1)(b). See also Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301 (1981).

^{30/} In those districts where there is a federal defender, the federal defender may, consistent with the primary commitment under the Criminal Justice Act, serve as a central repository on reoccurring violations. The legislation could place the responsibility for

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officers who violate citizens' constitutional rights such as engaging in unlawful arrests or searches.^{31/} The difficulties are much greater in instituting criminal proceedings against federal law enforcement officers working closely with his office. This dependent relationship compromises the objectivity necessary to exercise the broad discretion in initiating such prosecutions. The legislation authorizing a special prosecutor^{32/} should be expanded to permit a district court upon a showing of reasonable belief that a officer committed an illegal search, to appoint an attorney as a special prosecutor with the same authority as a U.S. Attorney to determine if a case should be presented to a grand jury. If the grand jury returned an indictment, then the special prosecutor should take the case to trial. A federal defender office might be considered for that role because of its own inherent investigation capability as well as its skill in handling federal criminal cases.^{33/} Within the existing framework the federal system could provide for reasonable checks and balances to ensure there is serious scrutiny of alleged police violations of the Constitution.

Conclusion

President Reagan recently referred to the distinguishing feature between our form of government and that of the Soviets--the principle of morality--that the end does not justify the means. The government operates through its police agencies, and now federal law enforcement agencies take on monolithic proportions. Each officer must feel a personal sense of accountability and the oath of office to support the constitution must be fairly enforced. Federal law enforcement should enforce all the laws including the Fourth Amendment. The Supreme Court has been both sensitive and responsive to the

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evaluating the case and assigning counsel to the federal defender rather than the court or it could permit an interim investigation by the federal defender and then a nunc pro tunc ratification by the court similar to the Criminal Justice Act. This provision does not make the investigation or appointment of counsel depend upon financial ability to employ counsel, for the wrong done by government officers might not justify the substantial expenditures for counsel, and therefore economically inhibit these suits where there was actual misconduct. In the same fashion in which an accused in the military can obtain skilled and legally qualified military counsel, clients in these suits should have the same unrestricted access. 10 U.S.C. 827. If the individual could obtain private counsel, he would be encouraged to do so.

^{31/} See Who is Guarding the Guardians? A Report on Police Practices (Commission on Civil Rights, 1981).

^{32/} Post-Watergate legislation authorized a procedure for the appointment of a special prosecutor for criminal prosecution of high-level official misconduct. 28 U.S.C. § 591 et seq.

^{33/} In Florida, the public defender of Miami (Dade County) was made a special prosecutor to investigate and prosecute official corruption occurring in another county.

needs of law enforcement, and has modified, restricted, and reduced the influence of the exclusionary rule, but the proposed legislation by Congress is little less than nullification. Senator Kennedy, as an informed and responsible statesman, had asked for an empirical survey to determine the need for such revolutionary legislation, but the need was not established. Before the legislation is further pushed, great care should be taken and a more comprehensive set of surveys commissioned in several districts, both large and small, to determine how many motions to suppress evidence for illegal searches are actually granted. Our estimate is that there would be few.

Although the public is frustrated with the crime problem, the fundamental precepts upon which this government is founded should not be so easily disregarded. In Boyd v. United States, 116 U.S. 616, 635 (1886), Justice Bradley said it very well:

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law. (Emphasis added).

PREPARED STATEMENT OF BENJAMIN LERNER

Summary of Testimony

These proposals to modify or eliminate the exclusionary rule seem to proceed from the assumption that changes in our criminal justice system alone can have a major impact on the violent crime in the United States. This is not the case, since most criminal acts never result in a criminal proceeding. It is estimated that of every 100 crimes; only 6 result in an arrest. In addition, the rule is applied in only a very few cases. A recent national study undertaken by GAO in the federal courts found that the rule was used in 1.3% of the 2,800 cases sampled. Further, the rule affected the case's outcome in less than 1% of the cases.

Proponents of the elimination of the exclusionary rule seriously misperceive the reasons for the rule, its firm constitutional basis, and the history of police conduct and criminal procedure in this country. The reasons for the rule are two-fold:

1. to prevent the courts from becoming an integral part of unlawful and unconstitutional activity; and
2. to deter unlawful police conduct by the only means which have had some degree of success.

The exclusionary rule has existed on the federal level since 1914; it became applicable to the states in 1961. History has demonstrated the futility of attempting to enforce the Fourth Amendment without the exclusionary rule. Police have unlawfully broken into homes, arrested persons without warrants, and committed outrageously illegal actions. The proposed modification would result in a throwback to this type of conduct.

* * * * *

Mr. Chairman, members of the Committee:

Thank you for the opportunity to appear before you today. My name is Benjamin Lerner. I am a lawyer from Philadelphia, Pennsylvania, and I am the Chief Defender

of the Defender Association of Philadelphia. I am appearing today on behalf of the National Legal Aid and Defender Association (NLADA), an organization which represents the interests of public defenders and legal services lawyers and their clients throughout the country.

My own office, the Defender Association of Philadelphia, represents indigent defendants in approximately 70% of all of the criminal cases in the Philadelphia court system. Last year we handled well over 30,000 criminal matters ranging from the least serious misdemeanor cases to the most serious felony cases. We represent both adult and juvenile defendants from arrest through post-conviction proceedings.

From June, 1973 through January, 1975, I served as a Deputy Attorney General with the Pennsylvania Department of Justice. As Chief of the Department's Office of Criminal Law, I represented the State Police and the Bureau of Corrections and supervised the Department's own criminal investigation staff.

I respectfully believe that this experience on both sides of the criminal justice aisle provides me with a good perspective from which to comment on the issues now being considered by this committee. Before making specific responses to the bills under consideration here, however, I would like to make three general comments which apply to all three of the bills in question, as well as to much of the testimony thus far given in their support.

First, these proposals seem to proceed from the assumption that changes in our criminal justice system alone can have a major impact on the violent crime rate in the United States. Nothing could be further from the truth. The large majority of criminal acts committed in this country

never result in a criminal proceeding. Indeed,* it is estimated that for every 100 crimes, only 30 are reported.* In light of these facts, it is difficult to see how merely changing the "rules" of the criminal justice system in one way or another will accomplish the goal of reducing this country's crime rate.

No approach to this problem which does not address the causes of crime in this country is likely to succeed. Changes in programs that affect health, welfare, institutionalized discrimination, racism, or other social inequities are much more likely to lower the crime rate than changes in the exclusionary rule.

Second, proposals such as these appear to be biased, at least in part, on a totally inaccurate underlying assumption that has pervaded much of what is written for the public about the criminal justice system. That assumption is that judges throughout the country -- in both federal and state courts -- are virtually lying in wait for unwary police and prosecutors in an attempt to use every "legal technicality" at their command to free persons charged with serious crimes. Anyone who has had even the remotest connection with the everyday operation of our criminal court system knows this to be unmitigated fallacy. On the contrary, defendants in criminal cases, particularly if they are poor and even more particularly if they are minorities, know too well that it is they

* Law Enforcement Assistance Administration, Criminal Victimization in the United States, 1978, 12-14 (1980) (only 30% of crimes reported to police); Federal Bureau of Investigation, Uniform Crime Reports 175 (1979) (only 21% of reported crimes in 1978 resulted in an arrest).

Because career or habitual criminals generally commit more than one crime a year, "clearance rate" statistics (which relate arrests to the number of crimes) probably understate the proportion of criminals who are arrested each year. See C. Silberman, Criminal Violence, Criminal Justice, 101-02 (1978).

and not the prosecution who must bear the burden of proof if they are to be acquitted.

Third, and perhaps most disturbing, the proposals to "modify" the exclusionary rule seem to proceed from the assumption that the rule is some technical, procedural device which can be modified by Congress at will. This is not the case. Years of Supreme Court litigation and a long line of cases make it abundantly clear that the exclusionary rule is a constitutionally mandated element of the Fourth and Fourteenth Amendments to the Constitution. See Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

This point has been made forcefully and with thorough, scholarly documentation many times. (See the Statement of Professor William W. Greenhalgh on behalf of the American Bar Association submitted to the Attorney General's Task Force on Violent Crime, June, 1981.) I will not belabor it further. Suffice it to say that Congressional attempts to "modify" or "repeal" the exclusionary rule are only one aspect of a broader attempt to amend the Constitution by legislation or to remove from the courts jurisdiction to interpret the Constitution in politically sensitive areas. Times of economic, social and political stress often give rise to such efforts. It is precisely during such times that we must remind ourselves that Constitutional provisions are intended to be insulated from temporary shifts in public opinion or political power.

I will turn now to a discussion of the specific provisions to "modify" the exclusionary rule contained in the three proposals under discussion here.

S.101 would amend Title 18 of the United States Code to nullify the exclusionary rule in Federal Criminal trials

unless the court finds a Fourth Amendment violation which is "intentional or substantial." The bill provides no meaningful definition of these terms.

S.1996 would amend Title 18 of the United States Code to nullify the exclusionary rule unless the court finds a Fourth Amendment violation caused by "intentional misconduct," "gross negligence," or by a lack of good faith" on the part of the officers in question. Again, the bill provides no meaningful definition of these terms, although it might be suggested that existing tort law provides the definitions for "intentional misconduct" and "gross negligence."

S.751 would abolish the exclusionary rule in Federal Criminal Courts and would substitute for it a narrow, inadequate civil remedy which very few victims of illegal searches and seizures could use effectively. S.751 also provides for administrative disciplinary sanctions against officers who violate the Fourth Amendment, but only if the officer's conduct lacks "good faith."

All of these recommendations would effectively do away with the exclusionary rule, which provides that evidence seized by law enforcement officials in violation of the Fourth Amendment to the Constitution of the United States is not admissible in criminal proceedings. Anyone who believes that the exclusionary rule and these so-called "good faith," or "intentional misconduct" standards can co-exist also believes in the tooth fairy. It is hard enough now to persuade judges to find, except in the most egregious circumstances, that police officers have violated the Fourth Amendment in conducting a search or a seizure. It would be virtually impossible to persuade courts to so hold if they also had to find explicitly that the officer in question was acting unreasonably or in bad faith in

order to suppress the evidence in question.

Moreover, proponents of the recommendation would have us believe the the "good-faith" exception would simplify trials and pre-trial proceedings by doing away with a lot of "technical" arguments or defenses based on the Fourth Amendment. Clearly, this is not the case. The exclusionary rule is not complicated. It is extremely simple.

It is the law of search and seizure that is complicated, and it would not be clarified one iota by abolition of the exclusionary rule. Imagine how much more difficult it would be to litigate a constitutional issue which turned ultimately on what was in an officer's mind at the time he took certain action. This is what would be required if we were to decide whether a particular act was done in "good faith," or constituted "intentional misconduct."

Such a standard also would have an adverse impact on the efforts of honest officers to conform their conduct to the requirements of the Constitution. Fourth Amendment search and seizure law may be complicated but it is teachable. No one can teach police officers how to decide in advance whether a reviewing court subsequently will determine that their conduct is done in "good faith," or is not "intentional" or whether their Fourth Amendment violation is "substantial."

Proponents of these statutes contend that public respect for the courts and the judicial process are adversely affected by the exclusionary rule. They contend, as do many others, that the public cannot understand why evidence of a crime is not admissible simply because the police officer may have committed a "technical error" in obtaining such evidence. The solution they propose is to do away with the exclusionary rule, or at least cripple it to such extent that it will cease to be a factor in

American Criminal courtrooms.

Such an approach seriously misperceives the reasons for the exclusionary rule, its firm constitutional basis, and the history of police conduct and criminal procedure in this country. Indeed, it seems to me that the so-called "problem" with the exclusionary rule lies not in its existence or its application, but rather in its public perception, or more correctly stated, misperception -- a misperception which is fed by recommendations such as these.

There are two reasons for the exclusionary rule:

1. to prevent the courts from becoming an integral part of unlawful and unconstitutional activity by allowing unlawfully seized evidence to be used in criminal proceedings; and

2. to deter unlawful police conduct by the only means which has had some degree to success in achieving this end.

Commentators opposed to the rule would have us believe that it is some recent phenomenon which courts have created out of whole cloth for the sole purpose of frustrating effective law enforcement. This is simply not true. The exclusionary rule, as stated above, is firmly grounded in the Fourth Amendment prohibition against unreasonable searches and seizures. It protects some of our most basic rights as citizens.

For many years, federal and state courts operated without the exclusionary rule on the basis that other means short of excluding illegally seized evidence could deter unlawful police conduct.

Not until 1914, in Weeks v. U.S., 232 U.S. 383, did the Supreme Court hold that illegally seized evidence could not be used in Federal prosecutions. Even then the Court refused to apply the exclusionary rule to the states,

hoping that state courts and/or legislatures would develop other less drastic but effective alternatives to deter unconstitutional conduct. Forty-seven years passed before the Supreme Court decided that no such alternatives were forthcoming and that application of the exclusionary rule to state criminal proceedings was essential to ensure nationwide observance of the Fourth Amendment. Mapp v. Ohio, 367 U.S., 643 (1961).

The history of our state and federal jurisprudence, as illustrated by the facts of hundreds of cases decided before the exclusionary rule was adopted, demonstrates the futility of the attempt to enforce the Fourth Amendment without the exclusionary rule. The rule has played a role in deterring the most egregious forms of police misconduct as in the following pre-exclusionary rule examples.

In Rochin v. California, 342 U.S. 165 (1952), the police had information of an unspecified nature that the defendant was selling narcotics. They went to defendant's home without a warrant, entered his house, broke open his bedroom door, and found him sitting on his bed. Upon seeing the officers, the defendant swallowed two capsules which had been on the night stand next to him. The three officers jumped on defendant and tried to get him to spit out the capsules. When this tactic failed, they took him to a hospital and had his stomach pumped by the forcible insertion into his stomach of a tube containing an emetic solution. This caused the defendant to vomit up the capsules, which were subsequently admitted into evidence in defendant's state court narcotics possession trial.

The defendant was convicted, notwithstanding his objection that the capsules were illegally seized from him and could not be used as evidence. The California Supreme Court affirmed the conviction. The Supreme Court of the United

States reversed this holding only because the police conduct was so egregious that it violated the defendant's right to due process of law, a constitutional protection separate from search and seizure.

Two years later, the Supreme Court faced similar facts -- without the due process issue -- in Irvine v. California, 347 U.S. 128 (1954). Suspecting the defendant of illegal gambling activity, police illegally entered his house without a warrant and installed concealed microphones in the defendant's hall, bedroom, and closet. Wires from the microphones were strung to a neighboring garage, where the police overheard conversations inside the defendant's house. Police testimony concerning these conversations, covering a period of over a month, was used at defendant's trial, over his objection, to convict him of various gambling offenses.

Justice Jackson's Opinion for the majority of the United States Supreme Court stated that the officers' conduct was so illegal as to "almost incredible if it were not admitted." 347 U.S. at 132. Nevertheless, the Court affirmed Irvine's pre-exclusionary rule conviction because the due process clause did not offer citizens sufficient protection from police conduct which, while admittedly outrageous and unconstitutional, did not involve the physical invasion of the defendant's body present in Rochin.

Of course, defense lawyers still argue over whether a police officer's conduct is or is not in conformity with the Fourth Amendment. Of course, defense lawyers continue to raise objections to the probable-cause sections of arrest and search and seizure warrants. However, the factual issues in these new cases demonstrate a much greater police sensitivity to the rights of citizens

to be secure in their persons, houses, and effects than was demonstrated in pre-exclusionary rule days. ^{[Telo] He} We are much more likely to be arguing over whether a police officer who lawfully stops a car can look in the glove compartment, or whether an informant whose observations become the basis for a search warrant has given the police sufficient, accurate information in ^[Prior] ~~the~~ cases to be deemed "reliable." The rule indeed has had a beneficial effect on police practices in this country.

It has been said, however, that the exclusion of relevant evidence and the acquittal of apparently guilty defendants is too high a price to pay for the purity of our courts and an improvement in police practices. The people who make this argument point to specific individual cases as examples of what they believe is a wave of dismissals of serious criminal charges sweeping the country. This is nonsense. Anyone who practices in our criminal courts knows that judges at every level of the state and federal system go out of their way to sustain police conduct and to deny motions to suppress based on alleged Fourth Amendment violations. Any doubt on this subject should have been put to rest once and for all by the General Accounting Office study conducted in 38 U.S. Attorney's Offices over a 2 month period in 1978*. This study of over 2,800 cases showed that evidence was excluded in only 1.3% of the cases studied and that the outcome of less than 1% of these cases had been affected by the application of the exclusionary rule. Surely, this is not too high a price to pay for the enforcement of the Fourth Amendment, particularly when we have seen the futility of using other means, such as civil suits or

* Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. GGD-79-45 (19 April, 1979).

criminal prosecutions against police officers, to guarantee these fundamental rights.

The debate over the exclusionary rule demonstrates very clearly the fundamental error inherent in the suggestion that a serious national problem -- the increase of violent crime -- can be satisfactorily addressed merely by tinkering with the criminal justice system and changing a few "outmoded" rules and procedures. The tinkering proposed here would extract a particularly high price. It would seriously undermine the historic constitutional protection of individual liberties which are at the foundation of our system.

It may be that at this point there are some in this country who would pay the cost of reduced personal liberty to achieve a far greater degree of real or imagined personal security. However, this is not the choice. Even payment of the price described here will not give us what we are looking for in terms of a radical decrease in the amount of violent crime which now plagues the country. To achieve this end we must instead focus our attention and our resources on the eradication of the social and economic inequities which create crime. Only if we are willing to accept this challenge can we examine our criminal justice system with the hope that any modifications there will give us the domestic tranquility for which we are searching.

Thank you again for this opportunity to present my views. I would be very happy to respond to any questions the Committee might have.

PREPARED STATEMENT OF GERARD F. TREANOR, JR.

SUMMARY

The National Association of Criminal Defense Lawyers is opposed to the abrogation, elimination, impairment or limitation of the exclusionary rule which precludes the admissibility of evidence seized in violation of the Constitution. The rule is by case law incorporated into the Fourth and Fourteenth Amendments to the Constitution, and is therefore beyond the permissible scope of legislative enactment. Further, as a practical and historical matter, the rule has vindicated the substantive rights granted by the Constitution with negligible negative effect on the efficacy of the federal criminal justice system. Indeed, a by-product of the rule has been improved law enforcement standards, training and performance.

S. 101 is facially unconstitutional by virtue of abrogating the reasonableness standard of the Fourth Amendment. Additionally, a good faith exception would swallow the rule and would create havoc with the fact finding process. S. 751 in addition to being facially unconstitutional, proposes an alternative tort remedy that encourages and rewards violations of the Constitution rather than deterring them.

The National Association of Criminal Defense Lawyers supports the retention of the exclusionary rule in the federal courts and opposes the passage of the several proposed bills which would eliminate, abrogate or limit the application of the Exclusionary Rule.

The National Association of Criminal Defense Lawyers is a nationwide organization comprised of 2,300 members, all of whom are active criminal defense advocates. The membership of NACDL practices in virtually every state and federal trial and appellate jurisdiction in the United States. The position articulated by the Association is the distillation of the aggregate experience of 2,300 state and federal public defenders and defense lawyers in private practice.

CONSTITUTIONAL DIMENSIONS

The federal exclusionary rule as enunciated in Weeks v. United States provides a remedy for violations of the Fourth Amendment by law enforcement officials. It subsequently has been extended to provide a remedy for violations of the Fourteenth Amendment. Careful reading of the Supreme Court cases reveals that the rule is an integral and essential part of the Fourth and Fourteenth Amendments and, in that sense, pro-c¹ribes Congress from revoking or rescinding the rule.

In addition to being the remedy for the violation of constitutional rights, the rule assures the integrity of the judicial system by preventing it from being a party to violations of the supreme law of the land. The legitimacy of all government acts and organizations, including the criminal justice system was, for our founding fathers, and must be for us, grounded in the fairness of the relationship between the individual and the government. This is especially so in the context of an adversary relationship as is demonstrated by the protections accorded to criminal defendants by the Constitution. The protection of the integrity of the courts ensures not only fairness, but also the appearance of fairness.. As the classic words of Mr. Justice Brandeis state so well,

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... if the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. U.S., 277 U.S. 438 (1928), 485 (dissent).

The United States of America has served as a hallmark of civilization in its commitment to its own laws. Contemporary events in numerous other nations have borne out the inherent truth of Mr. Justice Clark's words: "Nothing can destroy a government more quickly than its failure to observe its own laws..." Mapp v. Ohio, 367 U.S. 643 (1961)

The exclusionary rule has been vilified and blamed for handicapping the police by preventing them from effectively fighting crime. This is

NOTE.--Footnotes appear at end of statement.

erroneous both philosophically and factually. Insofar as the police are restrained from breaking the law of the land, this is not done by the rule, but by the Constitution itself. The rule by definition has no substantive content, and sets no standards of conduct for the government. It is more correctly the active manifestation of the commands of our most basic law.

SALUTORY EFFECTS ON ADMINISTRATION OF JUSTICE

The rule has had substantial salutary effects upon the administration of justice in the United States. This is borne out by the fact that the governments of other countries have fashioned exclusionary rules based on the experience of the United States. Section 24(2) of the recently ratified Canadian Charter of Rights and Freedoms forms an intrinsic part of that country's constitution. It incorporates an American style exclusionary rule which excludes evidence obtained in a manner "...that infringed or denied any rights or freedoms guaranteed by this Charter." This provision was adopted as a response to gross abuses by police under the rule in Wray's Case which dictated that all evidence was admissible regardless of the method of obtaining it.

Prior to Weeks, history was rife with documented instances of police abuse of power and citizens' rights. These included gross violations of the Fourth Amendment requirements for warrants and probable cause. All too familiar to the America of that period were accounts of confessions obtained by physical and psychological abuse. While evidence gained by violation of the law may be easier to obtain, it is certainly less reliable. Allowance of illegally lax procedures breeds an acceptance of lower standards of performance generally and an inherent disrespect for the law on the part of the enforcers. If violations of the Fourth Amendment are condoned, it follows that respect for the Fourth Amendment and other constitutional guarantees will be diminished by that much. It is but a small step in the minds of the over-zealous from seizing evidence in violation of the Constitution to manufacturing evidence for the good of society. The classic and oft condemned aphorism

that the end justifies the means has marked regression into barbarism throughout the history of man no less in the modern age than the distant past.

The rule provides an incentive to challenge the propriety of law enforcement conduct in a timely and systematic fashion. This has yielded a judicial focus on constitutionally required behavior in law enforcement which has, in turn, improved the quality of police work, education and procedure. It is in the interest of judicial economy to litigate these constitutional issues in the context of criminal pretrial proceedings. The institution of separate actions, which has been suggested, would further clog an already burdened federal court system, and cause additional expense to a justice department which would be charged with defending challenged actions and procedures. In the context of criminal proceedings, the protagonists are already in place and familiar with the issues and facts in questions. Witnesses are readily available and can be summoned by subpoena carrying the authority of the United States.

CIVIL REMEDIES CLOG COURTS; ARE INEFFECTIVE

Institution of a separate civil action would not only impair judicial economy but would, in light of current court backlogs (a year or more in some federal district courts), substantially delay the litigation of the constitutional issues. The enforcement of the constitutional guarantees would thereby be undermined. The surest redress is that which is most immediate and certain. The deterrence of illegal police conduct which has been the product of the exclusionary rule would be in large measure lost. The incentive to improve police procedures would recede into the indefinite future awaiting a multiplicity of civil suits. Concern for the congestion of the federal courts caused by increased civil filings has been the subject of commentary by the Chief Justice and various other commentators. Indeed, it has been proposed on numerous occasions that diversity jurisdiction should be withdrawn from the federal courts to alleviate this problem. Civil remedies such as that proposed in S. 751 work at cross purposes with those who would

remedy the ever increasing backlog of civil litigation.

Not only would the federal courts be forced to bear the additional burden, but also the resources of the U.S. Attorneys would be similarly strained. Presently, U.S. Attorney's offices devote approximately 1.3 percent of their available time to Fourth Amendment motions.² Inevitably, this would be increased if each motion was converted to a separate civil suit. Duplication of discovery and factual hearings would be the rule rather than the exception.

The proposed civil remedies are largely illusory. In the federal judicial system, law suits are expensive, burdensome and time consuming. The expense and complexity of federal civil litigation would deter large numbers of meritorious complaints from the beginning. But there are yet other hurdles. The activities complained of in these cases are very often witnessed only by the defendant and the police officer resulting in a swearing match. It is a matter of common experience that the defendant in a criminal case arrives on the witness stand with credibility perceived as inferior to that of a police official. Indeed, even the ordinary civilian who is plaintiff in a civil rights suit against a police officer appears with a credibility disadvantage in the eyes of a jury. This is not insurmountable, but is a barrier nonetheless.

Finally, the compensation for prevailing plaintiffs would be pathetically meagre. Persons accused of crimes are not litigants who would evoke sympathy in a jury. As with the question of credibility, a jury would almost inevitably identify with the officer and would decide damage issues on the basis of the status of the litigants rather than the actual harm suffered. Additionally, any substantial judgment would be virtually uncollectable. Most police officers are "judgment proof," they lack enough property subject to execution to satisfy the judgment. A damage suit without a solvent defendant is at best illusory. It is unlikely that the potential plaintiffs could afford the attorney's fee, thereby necessitating a contingent fee arrangement. This would certain-

ly discourage attorneys from undertaking this sort of litigation.

The tort remedy proposed in S. 751 would do little to improve the shortcomings of civil remedies in general and would have no deterrent value at all. Proposed 18 U.S.C. 2692(d) actually rewards officials for violating the Constitution by limiting damages in cases resulting in a criminal conviction. Effectively it encourages officials to gather as much evidence as possible by whatever means at hand regardless of the illegality of those means. It is essentially a double or nothing gamble. Government misconduct is punished only if the misconduct is not successful. Actual physical and property damages are at best remotely related to the interests which are protected by the Fourth Amendment, i.e., the right to be free from unreasonable searches and seizures. A conviction stemming from the illegally seized evidence would therefore preclude any vindication of the violated rights.

Even if a defendant were to prevail in a civil suit under proposed 18 U.S.C. 2692, the \$25,000 limit placed on recovery undermines the deterrent value. It is not at all inconceivable that government officials would simply regard such expenditures as a cost of doing business. This is especially so in major investigations where the investigative costs often run into six and even seven figures. An official who can justify breaking the law to obtain a conviction would certainly not blanch at the thought of spending a few thousand more dollars of the taxpayers' money in the same pursuit.

Proposed civil remedies do not take into account the potential conflicts between the Fifth Amendment and the civil discovery process. The price of instituting a civil action would be the waiver of Fifth Amendment rights not to testify. This is dictated by Federal Rule of Civil Procedure 37 which compels discovery. Once again this points out the burden which would be worked upon the courts' time and resources by litigation over such collateral matters. To prevent the obvious conflict, it would be necessary to create a new and different exclusionary rule which would exclude the admission of testimony (and/or the fruits thereof)

from a civil hearing in the related criminal case.

NEGATIVE EFFECTS OF RULE ARE DE MINIMIS

The magnitude of what are perceived as negative effects of the rule have been astronomically distorted. The statement that numerous guilty criminals go free due to "legal technicalities" is simply not factually true. This misconception has been laid to rest by virtually every empirical study of the effects of the exclusionary rule on the admissibility of evidence and the declension of cases. The General Accounting Office in a report to the Chairman of the Senate Judiciary Committee found the effect on the exclusionary rule on federal prosecutions to be minimal almost to the point of being statistically insignificant. Studying 2,804 cases filed by 38 U.S. Attorneys' offices, the G.A.O. found that less than 9 percent of defendants filed motions to suppress evidence based upon violations of Fourth Amendment search and seizure requirements. Of the motions filed, "...the vast majority either were decided in favor of the Government or not heard." Ultimately, in only 1.3 percent of the 2,804 defendant cases was evidence excluded as a result of filing a Fourth Amendment motion. Figures for the declension of cases were even more striking. The report found that only four tenths of one percent of declined defendants' cases were declined due to Fourth Amendment search and seizure problems! These figures demonstrate a reality very different from that which critics of the rule would have us believe. If anything, these figures demonstrate that the rule has encouraged constitutional conduct at a very low cost in terms of suppressed evidence. A similar conclusion was reached in a study of state jurisdictions by the Institute for Law and Social Research. In the study of 8,766 arrests which were dismissed by the prosecutor after initial acceptance, only two percent of the dismissals were attributable to due process problems.

GOOD FAITH EXCEPTION SWALLOWS RULE

Proposed good faith exceptions to the exclusionary rule would effectively debilitate the rule as a deterrent. Such exceptions necessitate inquiry into the state of mind of the officers or officials involv-

ed. State of mind is ephemeral at best, but a good faith exception would further obfuscate it as it rewards ignorance. Not knowing the law or the facts would become a premium. This would further undermine training and educational efforts with police agencies; to know and disobey would be punished while not to know would be rewarded. With just these concerns in mind, the Supreme Court has for over 100 years steadfastly rejected subjective "good faith" tests. The line of cases rejecting such a test began with Stacey v. Emery, 97 U.S. 642 (1878) and is best expressed by the Court in Beck v. Ohio, 379 U.S. 89 (1964) where in Mr. Justice Stewart wrote:

"...if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." 379 U.S. at 97.

It would seem as a matter of logic and symmetry that if a standard of subjective good faith were to be adopted, we should also adopt the same standard for those accused of crimes. If governmental officials can violate the law in good faith, then good faith should also be instituted as an affirmative defense and ignorance of the law be asserted to shield the conduct of those accused of breaking the law. The effects of such an enactment would be similar to the effects of a good faith exception to the exclusionary rule: to make the fact-finding process a farce. We have in our history declined to ask juries to make judgments based on such subjective evidence and we should decline to do so when the conduct of government officials is being examined.

Likewise, the "substantial violation" limitation proposed in S. 101 requires a subjective basis which would be substituted for the objective "reasonableness" test which is an integral part of the Fourth Amendment itself. Obviously, this abrogates not only the exclusionary rule, but also the very heart of the Fourth Amendment protection from "unreasonable searches and seizures." Thus facially violative of the Constitution, such legislation is impermissible. Ker v. California, 374 U.S. 23 (1963); Torres v. Puerto Rico, 442 U.S. 465 (1979)

CONCLUSION

It is hard to escape the conclusion that the exclusionary rule has become the whipping boy for feelings of frustration which are caused by factors completely outside of the scope of the rule itself, or the criminal justice system of which it is a part. The criminal justice system has lately been called on the carpet by some segments of society for not properly attending to society's ills. The elimination, modification or replacement of the exclusionary rule will in no way improve the ability of the criminal justice system to cope with crime.¹ What it will do is to remove incentives for the police to restrict the use of their power within the bounds of the law. Indeed, it will encourage violations of the law. Perhaps the key is most poetically expressed through the character of Sir Thomas Moore, Lord Chancellor of England under Henry VIII:

"What would you do? Cut a great road through the law to get after the Devil? Oh? And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of the law, for my own safety's sake."²

FOOTNOTES

¹ In Weeks v. United States, 232 U.S. 383 (1914), Mr. Justice Day wrote for the Court:

"...Both of these Amendments contemplated perpetuating in their full efficacy, by means of a constitutional provision principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. 232 U.S. 383 at 391.

In Mapp v. Ohio, 367 U.S. 643 (1961), the Court held that the exclusionary rule is an essential segment of the Fourth and Fourteenth Amendments, thereby removing it from the sphere of legislative review. The Supreme Court is the sole arbiter of limitations on the exclusionary rule. U.S. v. Calandra, 414 U.S. 266, 372 (1973); Stone v. Powell, 428 U.S. 465 (1976); U.S. v. Havens, 466 U.S. 620 (1980); U.S. v. Salvucci, 448 U.S. 83 (1980).

² "Impact of the Exclusionary Rule on Federal Criminal Prosecutions" GGD-79-45, April 19, 1979, Appendix II, p. 12.

3 "Impact of the Exclusionary Rule on Federal Criminal Prosecutions"
GGD-79-45, April 19, 1979.

4 id., Appendix II, p. 10

5 id., p. 11

6 "What Happens After Arrest?" Institute for Law and Social Research,
May, 1978

7 "A Man For All Seasons" by Robert Bolt.

Seantor GRASSLEY. Thank you very much for your contribution to this hearing.

I would now call panel III, Mr. Norman Darwick, executive director of the International Association of Chiefs of Police, and Sue Marie Johnson, deputy director, Police Executive Research Forum.

Mr. Darwick, would you start and introduce the person that is with you?

STATEMENT OF A PANEL CONSISTING OF NORMAN DARWICK, EXECUTIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, ACCOMPANIED BY WILLIAM SUMMERS, COUNSEL, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE; AND SUE MARIE JOHNSON, DEPUTY DIRECTOR, POLICE EXECUTIVE RESEARCH FORUM

Mr. DARWICK. I am Norman Darwick. I am the executive director of the International Association of Chiefs of Police. And I am accompanied today by my associate, Mr. William Summers, counsel to the International Association of Chiefs of Police.

I do thank you, Mr. Chairman, for this opportunity to appear before the Senate Subcommittee on Criminal Law to express the beliefs of the International Association of Chiefs of Police regarding the exclusionary rule.

The IACP is a professional membership organization consisting of more than 13,000 police executives in 63 nations. The association was established in 1893 to further the science of police administration and to promote professionalism in law enforcement.

As you know, there are several bills introduced by various Congressmen and Senators dealing with the exclusionary rule. Therefore, I would like to focus on the IACP's position concerning the exclusionary rule rather than any one particular bill.

The exclusionary rule is judicially created, not mandated by the fourth amendment, which guarantees that persons, houses, papers, and effects shall be secure against unreasonable searches and seizures.

When the rule was first imposed on Federal courts the justifications offered were those of deterrence of illegal police conduct and maintenance of judicial integrity. I am referring to the *Weeks* case.

The deterrence ground was based on the theory that if the police could not use for prosecution evidence illegally obtained, they will have no incentive to gather evidence by improper means. Judicial integrity would be maintained by preventing courts from being accomplices in the wilful disobedience of the Constitution they are sworn to uphold.

I would like to abstract from my statement in the interest of time and ask that my full statement be included.

Senator GRASSLEY. The entire statement will be put in the record.

Mr. DARWICK. Thank you.

This rule, whereby any evidence, including confessions elicited in violation of a suspect's fifth amendment right against self-incrimination obtained by improper means, would be excluded in a State criminal trial, was announced in the Supreme Court's decision in *Mapp v. Ohio*.

Over the years, the deterrence rationale has become the court's primary emphasis; the judicial integrity argument has been all but abandoned. Yet no effort has been made to distinguish between the types of police misconduct asserted in different factual situations. The officer acting in a good faith belief that his actions conform to the letter of the law, only to find out later that, for example, the date was missing on a search warrant affidavit or that a statute is found to be unconstitutional, faces the same exclusion of evidence as does the officer who intentionally and substantially violates an individual's constitutional rights.

To be certain, at the same time the rule was created, it seemed as though the goal of deterring police misconduct could be accomplished by suppressing evidence obtained unlawfully. But the deterrence rationale is substantially weakened where good faith violations constitute the misconduct. If an officer is not aware of his violation, he certainly will not be deterred by the suppression of the evidence he secured. Indeed, there is no misconduct to be deterred.

Although the exclusionary rule is aimed at police, no sanctions are directed toward them if they secure evidence improperly. The application of the rule punishes society in the long run, for a criminal, often a dangerous one, is released to continue his unlawful behavior.

It is also worth noting how unrealistic it is to expect the police to apply, unerringly, the complex, frequently changing laws of search and seizure.

Justices of the Supreme Court, having weeks and months to study the factual situation, frequently do not agree among themselves in fourth and fifth amendment cases. Two cases the Court decided last term will illustrate this contention.

In *New York v. Belton*, a police officer searched the passenger compartment of a vehicle without a warrant after placing the occupants under arrest based on probable cause. His actions were upheld by the Supreme Court in a 6-to-3 decision.

However, on the very same day, the Court determined in *Robbins v. California* that police officers could not search closed containers found in the trunk of an automobile, even though they had probable cause for arrest of the driver and the search of the trunk.

In this case, the Court could garner only four votes for a plurality opinion, from which not even a majority view can be gleaned.

When the Court itself cannot agree consistently in these types of cases, it is not surprising that police officers are not always entirely sure whether their actions conform with the law. The Supreme Court recognized this when it stated in *United States v. Peltier* that:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the fourth amendment.

Equally important is the fact that the search for truth is diverted when relevant and reliable evidence is kept from the trier of fact. The guilt or innocence of the accused is the focus of a criminal trial. This determination should be aided with the use of probative evidence, often directly supplied by the suspect himself.

Furthermore, it is not at all clear that the exclusionary rule deters improper police conduct. Studies yield conflicting results, yet the Supreme Court's observation in *United States v. Janis* can fairly be called accurate:

No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied.

Another limitation on the invocation of the exclusionary rule is the lack of a deterrent effect on police officers. In *Michigan v. DeFillippo*, a 1979 case, the Court refused to exclude evidence of a violation of one statute when that evidence had been seized during an arrest for a violation of a second statute later declared invalid. According to the Court, the police were entitled to rely on the presumption of statutory validity.

Likewise, the Court in *United States v. Peltier* again, in 1975, refused to apply the exclusionary rule where the conduct of the officer was not capable of being deterred.

In another case the Court recognized that the deterrent effect of police misconduct intended by the exclusionary rule is significantly diminished when officers act under a valid good-faith belief that their actions are proper.

As you know, Canada, England, and other Western European countries do not utilize the exclusionary rule. The issue of the guilt of the accused is treated as separate from the issue of police misconduct. Thus, evidence secured unconstitutionally would be admissible in trial, and the victim of the illegal search could recover monetary damages from the agency employing the misbehaving officer.

Due to the confusion created by the exclusionary rule, the diversion from the search for truth, the great social cost, and other harms flowing from the imposition of the exclusionary rule, we strongly support legislative modification of the exclusionary rule. Otherwise admissible evidence should not be excluded at trial if it is obtained by an officer who acted pursuant to a warrant later invalidated, a statute later held to be unconstitutional, or a Court decision subsequently overruled, or who acted in a reasonable and good-faith belief that his conduct was lawful.

This latter, reasonable and good-faith belief concept was the approach taken by the significant fifth circuit opinion in *United States v. Williams*.

The Court articulated a clear standard by which to measure the officer's conduct: The officer's actions must be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully.

The *Williams* holding has been followed recently in specific contexts by the highest courts of Delaware, Kentucky, Louisiana, New York, and Illinois.

In addition, the Attorney General's task force on violent crime has recently recommended, in light of the erosion of the deterrent effect on police conduct, that the exclusionary rule not be applied if evidence "has been obtained by an officer acting in the reasonable, good-faith belief that it was in conformity to the fourth amendment to the Constitution."

The IACP enthusiastically supports this proposal, for it affects one goal of our criminal justice system. That is, the search for truth without punishing society for unintentional violations of law-abiding law enforcement officers.

Modified as such, the harsh consequences resulting from the exclusion of reliable evidence would be minimized, and a deterrent effect would continue to be achieved where deliberate misconduct exists. Officers acting in good faith would not be penalized if a violation were to occur, and the search for truth would be furthered.

Thank you, Mr. Chairman.

Senator GRASSLEY. Ms. Johnson, you may proceed.

Ms. JOHNSON. Thank you, Senator Grassley.

I would like to enter my written testimony into the record and at the present time I will just give an oral summary.

Senator GRASSLEY. Your statement will be put in the record.

Ms. JOHNSON. The members of the police executive research forum appreciate this opportunity to express our views on the exclusionary rule and our proposal for an alternative to it.

The forum is an organization of police chief executives from the Nation's larger jurisdictions. Our goal is to improve the delivery of police services through conducting research, experimentation, and debate.

Like those who support the legislation addressed today, we in local law enforcement are disillusioned with how the exclusionary rule now operates in criminal proceedings. Still, we do not think that the proposed legislation offers the best means of achieving the rule's primary objective, which is to deter unconstitutional police conduct.

Whether the current operation of the exclusionary rule achieves this deterrent objective in a satisfactory manner is presently open to question. Now is the appropriate time to develop a method which truly assists us in meeting this objective while eliminating the problems surrounding the rule. The best way to realize that goal is to place the responsibility for deterring constitutional violations with those who can most effectively carry it out: police administrators.

In applying the exclusionary rule against individual officers, the judiciary can only have an indirect effect on their behavior. In con-

trast, police administrators, through internal regulatory programs of rulemaking, training, and discipline, can directly control officer violations.

What the forum recommends is that the exclusionary rule be used to place this responsibility with police administrators. Our substitute process redirects the focus of the exclusionary rule sanction from individual officers to police departments. The rule would be applied against departments who fail to assume their responsibility for deterring misconduct, rather than the individual officers who commit violations. The sanctioning of those officers would come from a much more effective source: the disciplinary actions of their superiors.

Under our process, the test for applying the exclusionary rule is whether the police departments have accepted their responsibility for deterrence, so that constitutional violations will be effectively minimized. If police departments institute rules, training, and discipline to deter constitutional violations, and the judge finds that these efforts are satisfactory, the courts would not impose the exclusionary rule, and evidence would then be used in trials. However, if police administrators cannot demonstrate they have fulfilled this responsibility, the exclusionary rule would then continue to be applied.

The opportunity to avoid the use of the exclusionary rule will provide incentive for police administrators to institute these deterrence measures. Currently, there is a disincentive for issuing internal regulations that guide officers in the complex area of constitutional requirements. Administrators fear that such rules will be used against them in suppression hearings. But if police administrators knew that issuing guidelines were the key to the Court's consideration to forego the use of the exclusionary rule, they would have the necessary incentive to institute these rules and enforce them. Having assumed their responsibility for constitutional violations, the constitutional violations would be minimized in all areas of law enforcement activities, not just those that come to the attention of the judiciary when they involve evidentiary matters.

The safeguards built into our proposal satisfies the objectives of both those who seek to eliminate or modify the rule, and of those who fear that curtailment of the rule will lead to increased constitutional violations by the police.

Furthermore, in addition to satisfying the concerns expressed in both these positions, we believe our proposal to be more effective and more realistic in achieving the rule's primary objective of deterrence, while at the same time it will broadly influence the improvement of policing.

To reiterate the basic concepts of our proposal, use of the exclusionary rule would be dependent upon the performance of the police department. A department could demonstrate it had taken seriously its responsibility by meeting three requirements: (1) publishing departmental rules on proper constitutional procedures; (2) instituting effective training programs; and (3) maintaining a history of disciplinary actions taken against officers who commit violations.

The components of our proposal are interwoven. Each one is complimentary to the others. Implementation of one alone will not

provide either an adequate substitute for the exclusionary rule or relief from the problems surrounding its use. The development of clear, precise departmental rules to guide officers will provide a method for spelling out the meaning of constitutional requirements in a manner which is understandable to police officers. Effective training programs will reinforce and clarify this guidance. And, finally, a comprehensive system of internal discipline will promote observance of the rules.

It is important to emphasize that with our proposed substitute we are not advocating the elimination of the exclusionary rule. To the contrary, it is an integral part of our process. The prospect that it will not be applied acts as an incentive for police departments to assume the responsibility which they can fulfill better than the courts: the control of their own officers' conduct. When they have proven they can do this, the rule will fall into disuse. In effect, the exclusionary rule will simply atrophy.

The gradual elimination of the exclusionary rule is similar to the bailout provision of the Voting Rights Act Amendments. Like a jurisdiction which is no longer subject to preclearance for election procedure changes, departments demonstrating that the requisite deterrence efforts have been met will not have the exclusionary rule applied to them.

None of these three pieces of legislation that are proposed today address the most important consideration for devising a remedy for constitutional violations. This is the assumption of responsibility by law enforcement executives for the violations of their officers. This will be the only means by which we can effectively insure that such violations are minimized. What is needed is a mechanism to test, not the subjective factor of good faith on the part of individual officers in particular cases, but the objective measurable factor of good faith efforts on the part of department administrators.

Under our proposed alternative, critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. As law enforcement executives who are responsible for the actions of their officers, accountable to the public, and answerable to the law, the forum members believe that this alternative will promote the ends of justice and the protection of our constitutional liberties.

Thank you.

I would be happy to answer any questions you might have.

Senator GRASSLEY. Mr. Darwick, I will ask you the first question.

You just heard the presentation—and I do not mean to put you on the spot—but if you have had a chance to evaluate the proposal, what do you think of placing responsibility for effecting the aims of the exclusionary rule on police administrators?

Mr. DARWICK. I do not think that is a unique approach. The police executives have that responsibility. Any time there is a change in legislation, there is a court decision impacting the enforcement of the law, police administrators have that responsibility. They have the responsibility to train and provide the appropriate training for their individuals.

Each time a court decision comes down impacting law enforcement, there are many changes made at the entry level, the inser-

vice level, the executive level, and training by the various police departments at the State, county, and municipal level.

It is not clear to me what the proposal is and I have not had any opportunity to evaluate the proposal.

Senator GRASSLEY. I have a question for Senator Mathias.

Professor Schlesinger has criticized the adoption of a good-faith exception in exclusionary rule cases and called for outright abolition of the rule. Basically he makes two basic arguments against this approach.

I am going to read these two responses and then ask you for your comments.

In the first instance he says, and I quote:

The task force recommendation virtually guarantees years of trial and appellate litigation focusing on what constitutes good and bad faith violation. The Supreme Court has already made so many fine distinctions in dealing with the question of when police may search and seize that a number of police departments have had to employ attorneys to explain the rules to the officers. The task force recommendation would make fourth amendment law even more impenetrable to officers, upon whose understanding of the law the privacy of all depends.

Then the second quote:

The task force recommendation puts a substantial premium on the ignorance of law enforcement officers. In order to render legitimate a search or seizure the officer need only convince the judge that he did not know or fully understand the applicable legal requirements. Ignorance may not be bliss, but it surely will have its uses in future search and seizure litigation if the task force recommendation becomes law.

Would you go first and then I will ask Ms. Johnson.

Mr. DARWICK. In regard to the abolition, you were not here earlier when the attorney general from the State of Florida, Jim Smith, responded basically to the same type of question.

We are probably not ready for total abolition and we do need some controls.

We think that modification of the current exclusionary rule is important.

The second part, the second question, would you read that again to me, please, sir?

Senator GRASSLEY. The task force recommendation puts a substantial premium on the ignorance of law enforcement officers. In order to render legitimate a search and seizure the officer need only convince the judge that he did not know or fully understand the applicable legal requirements. Ignorance may not be bliss, but it surely will have its uses in future search and seizure litigation if the task force recommendation becomes law.

Mr. DARWICK. I do not have any doubt that in some cases that would be tried on the Court and there would be an attempt to get away with some misconduct.

That is not what we are supporting. We think that there is an immediacy on the part of police officers on many occasions to make an arrest and to seize evidence and in that case we think that there should be some support. If he knowingly takes evidence that he has no right to, or he takes property that he has no right to, we do not support that.

Senator GRASSLEY. Ms. Johnson.

Ms. JOHNSON. I agree with both of the statements of Professor Schlesinger.

What the good-faith alternative does is avoid the issue of controlling misconduct. Our alternative in placing responsibility on law enforcement executives will accomplish the deterrent objective in the best manner. Law enforcement administrators would be responsible for guiding their officers and for controlling their officers.

This would do away with both the ignorance and the confusion issues which are raised in those statements. Instead of officers remaining ignorant, police administrators would have the incentive to provide guidelines to make clear to police officers the meaning of the fourth amendment.

Senator GRASSLEY. I have another question for Senator Mathias.

Certainly it is hard to dispute that some court decisions interpreting the fourth amendment are difficult to justify and understand.

The subcommittee has heard testimony on a number of cases that point out some of the inconsistencies in fourth amendment jurisprudence which can cause so much frustration.

But does the difficulty lie with the sanctions imposed by the exclusionary rule or with the inconsistencies in the Court interpretation of the fourth amendment guarantee itself?

And then another question: Should we not really be focusing on obtaining greater consistency and clarity in fourth amendment case law?

And, after all, is it not our real goal to make the fourth amendment understandable to those who are obliged to enforce it so that it can have the effect intended by the authors of the Bill of Rights?

I would like to have each of you comment on that.

Mr. DARWICK. Certainly we would like to see it simplified. We would like clear-cut guidelines which would assist everybody, not just the law enforcement people, but the prosecutors, the courts, and so forth.

Senator GRASSLEY. Ms. Johnson.

Ms. JOHNSON. Yes.

As to the proposition that the rule does not contain the inconsistency but the fourth amendment rulings do that is true. The rule is only a sanction against violations of the fourth amendment.

We also would like to see more clarity in fourth amendment interpretations. By placing the responsibility on law enforcement administrators they would be able to, No. 1, work with the judiciary to explain to them the realities of law enforcement, and, No. 2, they would then be able to guide their officers, in a more understandable manner, in fourth amendment procedures.

Senator GRASSLEY. Ms. Johnson, of course I just heard your suggestion too, but on the surface it seemed to me that what you have to have is a minimum standard here that everybody in the department is going to have to meet and/or be above, as opposed to simply have, as a result of usage, a rule that the department generally does follow. But you could have some people below the medium, let us say, because you are going to have the bulk meeting standards. You might have somebody drop a little bit below.

As that law enforcement officer affects individuals in the process of their daily work, you know, those individual people being arrested could have their rights violated even though the bulk of the department is doing well or above the standard.

Ms. JOHNSON. Well, that individual officer who was committing the constitutional violations would be disciplined under our alternative, whereas now when an officer commits a constitutional violation he really is not directly sanctioned. He might not even hear about the fact that the exclusionary rule was applied. And if he does find that it was applied, he would rarely hear the reasons behind it. So, he is very confused.

But under our proposal he would be personally affected because the department administrator would sanction him directly.

Senator GRASSLEY. What about the constitutional protections for the person that officer may have arrested?

Ms. JOHNSON. It would work the same way the exclusionary rule works.

Senator GRASSLEY. Thank you.

Ms. JOHNSON. Right.

Senator GRASSLEY. I presume from your suggestion that if a department generally met certain standards, then anything those officers did would be accepted and not in any way violate the constitutional rights.

Ms. JOHNSON. If they did violate a constitutional right, if the Court determined that a right was violated, it would look to see whether the department had a rule on that particular instance.

Let us say an officer fails to obtain a search warrant to go into the house of a third person to arrest someone. If the department failed to have a rule in that situation, the evidence would be excluded because the department had not lived up to its responsibility for deterring violations. But if the department had a rule saying an officer had to get a search warrant in this situation, and the officer violated it, if the judge determined that the department had had effective training programs and that it had a history of disciplining its officers for committing violations, then the judge would let that evidence in because he would be assured that that officer would be sanctioned by his department.

Senator GRASSLEY. Thank you.

[The prepared statements of Mr. Darwick and Ms. Johnson follow:]

PREPARED STATEMENT OF NORMAN DARWICK

SUMMARY

The IACP strongly urges modification of the "exclusionary rule" to incorporate a "good faith exception." Regardless of the original intent of the exclusionary rule - the maintenance of judicial integrity, or the modern deterrence rationale, the exclusionary rule has not been successful. A law enforcement officer cannot in a split second determine what it has taken judges several months to decide regarding the existence of probable cause. Further, the law enforcement community and the citizens of the U. S. should not be punished by allowing a dangerous criminal to go free for a technical violation of the exclusionary rule. Evidence gathered pursuant to a warrant later invalidated, in accordance with a statute subsequently found unconstitutional, or pursuant to court decisions later reversed, should not be suppressed. Suppression of evidence under these circumstances has absolutely no deterrent effect on legitimate law enforcement activities.

The IACP strongly supports the adoption of a good faith exception, as the 5th Circuit Court of Appeals has done in U.S. v. Williams. Where an officer acts with both subjective and objective good faith, evidence gathered pursuant to his or her activities should be admitted into evidence to assist in the determination of guilt or innocence of the accused. Such a modification would benefit by the decreased number of instances in which reliable evidence is excluded from trial. Our trial courts would be concerned with the goal of ascertaining the absolute truth. The exclusion of evidence would be triggered only by willful or flagrant violations of the fourth amendment. If a law enforcement officer acted in good faith and with reasonable regard for the citizen's constitutional rights, the exclusionary rule would not attach.

* * * * *

THANK YOU, MR. CHAIRMAN. I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE THE SENATE SUBCOMMITTEE ON CRIMINAL LAW TO EXPRESS THE BELIEFS OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE REGARDING THE EXCLUSIONARY RULE.

THE IACP IS A PROFESSIONAL MEMBERSHIP ORGANIZATION CONSISTING OF MORE THAN 13,000 MEMBERS IN 63 NATIONS. THE ASSOCIATION WAS ESTABLISHED IN 1893 TO

FURTHER THE SCIENCE OF POLICE ADMINISTRATION AND PROMOTE PROFESSIONALISM IN LAW ENFORCEMENT. IT IS COMPRISED OF CHIEFS OF POLICE AND OTHER LAW ENFORCEMENT PERSONNEL, ALTHOUGH COMMAND PERSONNEL MAKE UP OVER 70% OF ITS MEMBERSHIP.

AS YOU KNOW, THERE HAVE BEEN SEVERAL BILLS INTRODUCED BY VARIOUS CONGRESSMEN AND SENATORS DEALING WITH THE EXCLUSIONARY RULE. THEREFORE, I WOULD LIKE TO FOCUS ON THE IACP'S POSITION CONCERNING THE EXCLUSIONARY RULE RATHER THAN ANY ONE PARTICULAR BILL. THE EXCLUSIONARY RULE IS JUDICIALLY CREATED, NOT MANDATED BY THE FOURTH AMENDMENT, WHICH GUARANTEES THAT PERSONS, HOUSES, PAPERS AND EFFECTS SHALL BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES. WHEN THE RULE WAS FIRST IMPOSED ON FEDERAL COURTS THE JUSTIFICATIONS OFFERED WERE THOSE OF DETERRENCE OF ILLEGAL POLICE CONDUCT AND MAINTENANCE OF JUDICIAL INTEGRITY. WEEKS V. UNITED STATES, 232 U.S. 383 (1914). THE DETERRENCE GROUND WAS BASED ON THE THEORY THAT IF THE POLICE COULD NOT USE FOR PROSECUTION EVIDENCE ILLEGALLY OBTAINED, THEY WILL HAVE NO INCENTIVE TO GATHER EVIDENCE BY IMPROPER MEANS. JUDICIAL INTEGRITY WOULD BE MAINTAINED BY PREVENTING COURTS FROM BEING "ACCOMPLICES IN THE WILFUL DISOBEDIENCE OF A CONSTITUTION THEY ARE SWORN TO UPHOLD."

THIS RULE, WHEREBY ANY EVIDENCE, INCLUDING CONFESSIONS ELICITED IN VIOLATION OF A SUSPECT'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION OBTAINED BY IMPROPER MEANS, WOULD BE EXCLUDED IN A STATE CRIMINAL TRIAL, WAS ANNOUNCED IN THE SUPREME COURT'S DECISION IN MAPP V. OHIO, 367 U.S. 643 (1961).

OVER THE YEARS, THE DETERRENCE RATIONALE HAS BECOME THE COURT'S PRIMARY EMPHASIS; THE JUDICIAL INTEGRITY ARGUMENT HAS BEEN ALL BUT ABANDONED. YET NO

EFFORT HAS BEEN MADE TO DISTINGUISH BETWEEN THE TYPES OF POLICE MISCONDUCT ASSERTED IN DIFFERENT FACTUAL SITUATIONS. THE OFFICER ACTING IN A GOOD FAITH BELIEF THAT HIS ACTIONS CONFORM TO THE LETTER OF THE LAW, ONLY TO FIND OUT LATER THAT, FOR EXAMPLE, THE DATE WAS MISSING ON A SEARCH WARRANT AFFIDAVIT OR A STATUTE IS FOUND TO BE UNCONSTITUTIONAL, FACES THE SAME EXCLUSION OF EVIDENCE AS DOES THE OFFICER WHO INTENTIONALLY AND SUBSTANTIALLY VIOLATES AN INDIVIDUAL'S CONSTITUTIONAL RIGHTS. TO BE ^{certainly} SURE, AT THE TIME THE RULE WAS CREATED, IT SEEMED AS THOUGH THE GOAL OF DETERRING POLICE MISCONDUCT COULD BE ACCOMPLISHED BY SUPPRESSING EVIDENCE OBTAINED UNLAWFULLY. BUT THE DETERRENCE RATIONALE IS SUBSTANTIALLY WEAKENED WHERE GOOD FAITH VIOLATIONS CONSTITUTE THE "MISCONDUCT." IF AN OFFICER IS NOT AWARE OF HIS VIOLATION, HE CERTAINLY WILL NOT BE DETERRERD BY THE SUPPRESSION OF THE EVIDENCE HE SECURED. INDEED, THERE IS NO MISCONDUCT TO BE DETERRERD.

MOREOVER, ALTHOUGH THE EXCLUSIONARY RULE IS AIMED AT POLICE, NO SANCTIONS ARE DIRECTED TOWARD THEM IF THEY SECURE EVIDENCE IMPROPERLY. THE APPLICATION OF THE RULE PUNISHES SOCIETY IN THE LONG RUN, FOR A CRIMINAL, OFTEN A DANGEROUS ONE, IS RELEASED TO CONTINUE HIS UNLAWFUL BEHAVIOR. IT IS ALSO WORTH NOTING HOW UNREALISTIC IT IS TO EXPECT THE POLICE TO APPLY, UNERRINGLY, THE COMPLEX, FREQUENTLY CHANGING LAWS OF SEARCH AND SEIZURE.³ OFTEN THEY ARE CONFRONTED WITH LIFE-THREATENING SITUATIONS WHERE DECISIONS MUST BE INSTANTANEOUS, ON THE STREET, AND THE LEGAL RAMIFICATIONS ARE SUPERCEDED BY THE REQUIREMENTS OF THE MOMENT. NOR ARE THEY APPRISED THAT, IN THE EVENT OF AN APPEAL, THEIR ACTIONS WERE LATER INVALIDATED BY AN APPELLATE COURT. THUS, MISTAKES ARE RARELY CALLED TO THE ATTENTION OF THE ARRESTING OFFICER.

THE LAW OF ARREST, SEARCH AND SEIZURE IS SO COMPLEX TODAY THAT EVEN THE JUSTICES OF THE SUPREME COURT HAVING WEEKS AND MONTHS TO STUDY THE FACTUAL SITUATION FREQUENTLY DO NOT AGREE AMONG THEMSELVES IN FOURTH AND FIFTH AMENDMENT CASES. TWO CASES THE COURT DECIDED LAST TERM WILL ILLUSTRATE THIS CONTENTION. IN NEW YORK V. BELTON, ____ U.S. ____, 101 S. CT. ____, 69 L. ED 2D 744, (1981), A POLICE OFFICER SEARCHED THE PASSENGER COMPARTMENT OF A VEHICLE WITHOUT A WARRANT AFTER PLACING THE OCCUPANTS UNDER ARREST BASED ON PROBABLE CAUSE. HIS ACTIONS WERE UPHELD BY THE SUPREME COURT IN A 6-3 DECISION. HOWEVER, ON THE VERY SAME DAY, THE COURT DETERMINED IN ROBBINS V. CALIFORNIA, ____ U.S. ____, 101 S. CT. ____, 69 ED 2D 768, (1981), THAT POLICE OFFICERS COULD NOT SEARCH CLOSED CONTAINERS FOUND IN THE TRUNK OF AN AUTOMOBILE, EVEN THOUGH THEY HAD PROBABLE CAUSE FOR ARREST OF THE DRIVER AND THE SEARCH OF THE TRUNK. IN THIS CASE, THE COURT COULD GARNER ONLY FOUR VOTES FOR A PLURALITY OPINION, FROM WHICH NOT EVEN A MAJORITY VIEW CAN BE GLEANED.

WHEN THE COURT ITSELF CANNOT AGREE CONSISTENTLY IN THESE TYPES OF CASES, IT IS NOT SURPRISING THAT POLICE OFFICERS ARE NOT ALWAYS ENTIRELY SURE WHETHER THEIR ACTIONS CONFORM WITH THE LAW. THE SUPREME COURT RECOGNIZED THIS WHEN IT STATED IN UNITED STATES V. PELTIER, ^{Reed} 442 U.S. 531, 542 (1975):

IF THE PURPOSE OF THE EXCLUSIONARY RULE IS TO
 DETER UNLAWFUL POLICE CONDUCT THEN EVIDENCE
 OBTAINED FROM A SEARCH SHOULD BE SUPPRESSED
 ONLY IF IT CAN BE SAID THAT THE OFFICER HAD
 KNOWLEDGE, OR MAY PROPERLY BE CHARGED WITH
 KNOWLEDGE, THAT THE SEARCH WAS UNCONSTITUTIONAL
 UNDER THE FOURTH AMENDMENT.

EQUALLY IMPORTANT IS THE FACT THAT THE SEARCH FOR TRUTH IS DIVERTED WHEN

RELEVANT AND RELIABLE EVIDENCE IS KEPT FROM THE TRIER OF FACT: THE GUILT OR INNOCENCE OF THE ACCUSED IS THE FOCUS OF A CRIMINAL TRIAL. THIS DETERMINATION SHOULD BE AIDED WITH THE USE OF PROBATIVE EVIDENCE, OFTEN DIRECTLY SUPPLIED BY THE SUSPECT HIMSELF.

A RULE THAT MANDATES SUPPRESSION OF TRUSTWORTHY EVIDENCE UNDERMINES THE CONFIDENCE OF THE PUBLIC IN OUR CRIMINAL JUSTICE SYSTEM. IN STONE V. POWELL, 428 U.S. 465, 490-91 (1976) THE SUPREME COURT DECLARED:

THE DISPARITY IN PARTICULAR CASES BETWEEN THE ERROR COMMITTED AND THE WINDFALL AFFORDED A GUILTY DEFENDANT BY APPLICATION OF THE RULE IS CONTRARY TO THE IDEA OF PROPORTIONALITY THAT IS ESSENTIAL TO THE CONCEPT OF JUSTICE. THUS, ALTHOUGH THE RULE IS THOUGHT TO DETER UNLAWFUL POLICE ACTIVITY THROUGH THE NURTURING OF RESPECT FOR FOURTH AMENDMENT VALUES, IF APPLIED INDISCRIMINATELY IT MAY WELL HAVE THE OPPOSITE EFFECT OF GENERATING DISRESPECT FOR THE LAW AND THE ADMINISTRATION OF JUSTICE.

FURTHERMORE, IT IS NOT AT ALL CLEAR THAT THE EXCLUSIONARY RULE DETERS IMPROPER POLICE CONDUCT. STUDIES YIELD CONFLICTING RESULTS, YET THE SUPREME COURT'S OBSERVATION IN UNITED STATES V. JANIS, 428 U.S. 433, 450 (1976) CAN FAIRLY BE CALLED ACCURATE: "NO EMPIRICAL RESEARCHER, PROPONENT OR OPPONENT OF THE RULE, HAS YET BEEN ABLE TO ESTABLISH WITH ANY ASSURANCE WHETHER THE RULE HAS A DETERRENT EFFECT EVEN IN THE SITUATIONS IN WHICH IT IS NOW APPLIED."

IT HAS BECOME INCREASINGLY CLEAR THAT THE RULE APPLIES ONLY IN LIMITED SITUATIONS. EVIDENCE IS OFTEN ADMITTED UNDER A COLLATERAL USE EXCEPTION. IN UNITED STATES V. CALANDRA, 414 U.S. 333 (1974), THE SUPREME COURT HELD THAT A

GRAND JURY WITNESS COULD NOT REFUSE TO ANSWER QUESTIONS BASED ON EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT. THE COURT REFUSED, IN UNITED STATES V. JANIS, SUPRA, TO EXCLUDE FROM A FEDERAL CIVIL PROCEEDING EVIDENCE SEIZED UNCONSTITUTIONALLY BY STATE LAW ENFORCEMENT OFFICERS ACTING IN GOOD FAITH. IN UNITED STATES V. HAVENS, 446 U. S. 620 (1980) AND WALDER V. UNITED STATES, 347 U.S. 62 (1954), THE COURT REFUSED TO APPLY THE RULE WHERE THE ILLEGALLY OBTAINED EVIDENCE WAS USED FOR IMPEACHMENT PURPOSES.

A SECOND LIMITATION ON THE INVOCATION OF THE EXCLUSIONARY RULE IS THE LACK OF A DETERRENT EFFECT ON POLICE OFFICERS. IN MICHIGAN V. DEFILIPPIS, 442 U.S. 31 (1979) THE COURT REFUSED TO EXCLUDE EVIDENCE OF A VIOLATION OF ONE STATUTE WHEN THAT EVIDENCE HAD BEEN SEIZED DURING AN ARREST FOR A VIOLATION OF A SECOND STATUTE LATER DECLARED INVALID. ACCORDING TO THE COURT, THE POLICE WERE ENTITLED TO RELY ON THE PRESUMPTION OF STATUTORY VALIDITY. LIKEWISE, THE COURT IN UNITED STATES V. PELTIER, 422 U.S. 531 (1975) REFUSED TO APPLY THE EXCLUSIONARY RULE WHERE THE CONDUCT OF THE OFFICER WAS NOT CAPABLE OF BEING DETERRED. IN MICHIGAN V. TUCKER, 417 U.S. 433, 447 (1974), THE COURT RECOGNIZED THAT THE DETERRENT EFFECT OF POLICE MISCONDUCT INTENDED BY THE EXCLUSIONARY RULE IS SIGNIFICANTLY DIMINISHED WHEN OFFICERS ACT UNDER A VALID GOOD-FAITH BELIEF THAT THEIR ACTIONS ARE PROPER:

THE DETERRENT PURPOSE OF THE EXCLUSIONARY RULE NECESSARILY ASSUMES THAT THE POLICE HAVE ENGAGED IN WILLFUL, OR AT THE VERY LEAST, NEGLIGENT, CONDUCT WHICH HAS DEPRIVED THE DEFENDANT OF SOME RIGHT. BY REFUSING TO ADMIT EVIDENCE GAINED AS A RESULT OF SUCH CONDUCT, THE COURTS HOPE TO INSTILL IN THOSE PARTICULAR INVESTIGATING

OFFICERS, OR IN THEIR FUTURE COUNTERPARTS, A GREAT DEGREE OF CARE TOWARD THE RIGHTS OF AN ACCUSED. WHERE THE OFFICIAL ACTION WAS PURSUED IN COMPLETE GOOD FAITH, HOWEVER, THE DETERRENCE RATIONALE LOSES MUCH OF ITS FORCE.

FINALLY, THE SUPREME COURT HAS DETERMINED THAT OBJECTIONS TO AN ILLEGAL SEARCH AND SEIZURE MAY BE MADE ONLY BY THOSE WHOSE FOURTH AMENDMENT RIGHTS HAVE BEEN VIOLATED. ALDERMAN V. UNITED STATES, 394 U.S. 165 (1969). TWO CASES ON STANDING HAVE ILLUSTRATED THE COURT'S WILLINGNESS TO BALANCE THE LIKELIHOOD OF DETERRENCE AGAINST THE HARM DONE TO THE SEARCH FOR TRUTH. IN RAKAS V. ILLINOIS, 439 U.S. 128 (1978), THE COURT ASSERTED THAT THE EXCLUSIONARY RULE CANNOT BE INVOKED FOR THE BENEFIT OF ALL PERSONS BECAUSE OF THE "SUBSTANTIAL SOCIAL COST" INCURRED EACH TIME THE RULE IS APPLIED. SIMILARLY, IN UNITED STATES V. PAYNER, 447 U.S. 727 (1980), THE COURT HELD THAT EXCLUSION OF EVIDENCE IS NOT COMPELLED IN EVERY CASE OF ILLEGALITY; RATHER, THE HARM THAT FLOWS FROM THE APPLICATION OF THE RULE MUST ALSO BE TAKEN INTO CONSIDERATION.

INDEED, CANADA, ENGLAND AND OTHER WESTERN EUROPEAN COUNTRIES DO NOT UTILIZE THE EXCLUSIONARY RULE. THE ISSUE OF THE GUILT OF THE ACCUSED IS TREATED AS SEPARATE FROM THE ISSUE OF POLICE MISCONDUCT. THUS, EVIDENCE SECURED UNCONSTITUTIONALLY WOULD BE ADMISSIBLE IN TRIAL, AND THE VICTIM OF THE ILLEGAL SEARCH COULD RECOVER MONETARY DAMAGES FROM THE AGENCY EMPLOYING THE MISBEHAVING OFFICER.

DUE TO THE CONFUSION CREATED BY THE EXCLUSIONARY RULE, THE DIVERSION FROM THE SEARCH FOR TRUTH, THE GREAT SOCIAL COST, AND OTHER HARMS FLOWING FROM THE IMPOSITION OF THE EXCLUSIONARY RULE, WE STRONGLY SUPPORT LEGISLATIVE

MODIFICATION OF THE EXCLUSIONARY RULE: OTHERWISE ADMISSIBLE EVIDENCE SHOULD NOT BE EXCLUDED AT TRIAL IF IT IS OBTAINED BY AN OFFICER WHO ACTED PURSUANT TO A WARRANT LATER INVALIDATED, A STATUTE LATER HELD TO BE UNCONSTITUTIONAL, OR A COURT DECISION SUBSEQUENTLY OVERRULED, OR WHO ACTED IN A REASONABLE AND GOOD FAITH-BELIEF THAT HIS CONDUCT WAS LAWFUL. THIS LATTER, REASONABLE AND GOOD ^{fact} BELIEF CONCEPT WAS THE APPROACH TAKEN BY THE SIGNIFICANT FIFTH CIRCUIT OPINION IN UNITED STATES V. WILLIAMS, 622 F. 2D 830, 846-47 (5TH CIR. 1980), CERT. DENIED, 101 S. CT. 946 (1981), WHERE THE COURT CONCLUDED:

HENCEFORTH IN THIS CIRCUIT, WHEN EVIDENCE IS SOUGHT TO BE EXCLUDED BECAUSE OF POLICE CONDUCT LEADING TO ITS DISCOVERY, IT WILL BE OPEN TO URGE THAT THE CONDUCT IN QUESTION, IF MISTAKEN OR UNAUTHORIZED, WAS YET TAKEN IN A REASONABLE, GOOD-FAITH BELIEF THAT IT WAS PROPER. IF THE COURT SO FINDS IT SHALL NOT APPLY THE EXCLUSIONARY RULE TO THE EVIDENCE.

THE COURT ARTICULATED A CLEAR STANDARD BY WHICH TO MEASURE THE OFFICER'S CONDUCT: THE OFFICER'S ACTIONS MUST "BE BASED UPON ARTICULABLE PREMISES SUFFICIENT TO CAUSE A REASONABLE, AND REASONABLY TRAINED, OFFICER TO BELIEVE HE WAS ACTING LAWFULLY." ID. AT 841. THE WILLIAMS HOLDING HAS BEEN FOLLOWED RECENTLY IN SPECIFIC CONTEXTS BY THE HIGHEST COURTS OF DELAWARE, KENTUCKY, LOUISIANA, NEW YORK, AND ILLINOIS. SEE GRAY V. STATE, ____ A. 2D ____ (DEL. 1981); RICHMOND V. COMMONWEALTH, ____ S.W. 2D ____ (KY. APP. 1981); STATE V. LEHNEN, 403 SO. 2D 683 (LA. 1981); PEOPLE V. ADAMS, 53 N.Y. 2D 2, 422, N.E. 2D 537 (1981); PEOPLE V. PIERCE, 88 ILL. APP. 3D 1095, 411 N.W. 2D 294 (1980).

✓ IN ADDITION, THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME HAS RECENTLY RECOMMENDED, IN LIGHT OF THE EROSION OF THE DETERRENT EFFECT ON POLICE

CONDUCT, THAT THE EXCLUSIONARY RULE NOT BE APPLIED IF EVIDENCE "HAS BEEN OBTAINED BY AN OFFICER ACTING IN THE REASONABLE, GOOD FAITH BELIEF THAT IT WAS IN CONFORMITY TO THE FOURTH AMENDMENT TO THE CONSTITUTION." THE IACP ENTHUSIASTICALLY SUPPORTS THIS PROPOSAL, FOR IT EFFECTS ONE GOAL OF OUR CRIMINAL JUSTICE SYSTEM - THE SEARCH FOR TRUTH - WITHOUT PUNISHING SOCIETY FOR UNINTENTIONAL VIOLATIONS OF LAW-ABIDING LAW ENFORCEMENT OFFICERS.

MODIFIED AS SUCH, THE HARSH CONSEQUENCES RESULTING FROM THE EXCLUSION OF RELIABLE EVIDENCE WOULD BE MINIMIZED, AND A DETERRENT EFFECT WOULD CONTINUE TO BE ACHIEVED WHERE DELIBERATE MISCONDUCT EXISTS. OFFICERS ACTING IN GOOD FAITH WOULD NOT BE PENALIZED IF A VIOLATION WERE TO OCCUR, AND THE SEARCH FOR TRUTH WOULD BE FURTHERED.

THANK YOU. I WOULD BE HAPPY TO ANSWER ANY QUESTIONS YOU MIGHT HAVE.

PREPARED STATEMENT OF SUE MARIE JOHNSON

SUMMARY

The Forum's testimony recommends a substitute process for the exclusionary rule which will broadly influence the improvement of policing and achieve the primary objective of the current rule: to deter unconstitutional police conduct.

We suggest a process by which the responsibility for deterring police violations of citizens' constitutional rights be given to police departments, where this responsibility can be fulfilled more effectively than by the judiciary. This requires that the judiciary change the focus of the exclusionary rule sanction, from individual officers to the police departments. If police departments institute rules, training and discipline which deter police constitutional violations, and the judiciary finds these efforts satisfactory, then the courts will not impose the exclusionary rule. If the court finds the police department has a history of good faith efforts to deter officers from unconstitutional conduct, evidence will not be excluded. Sanctioning police officers for their misconduct will be left to the police department rather than the judiciary.

The opportunity to avoid the imposition of the exclusionary rule will provide the incentive for police administrators to institute these measures. If police administrators show the courts they can fulfill this responsibility, the need to apply the exclusionary rule will disappear. If police administrators can't fulfill this responsibility to the satisfaction of the courts, the exclusionary rule will continue.

To demonstrate their responsibility, police administrators must meet three requirements. They must:

1. develop departmental rules to guide officers in proper constitutional procedures.
2. institute effective programs to train officers in the proper procedures; and
3. maintain a history of disciplinary actions taken against officers who commit violations.

The safeguards built into our proposal satisfies the objectives of both those who seek to eliminate or modify the rule, and of those who fear that curtailment of the rule will lead to an increase in constitutional violations by the police. Our process enables reliable, relevant evidence to be used in criminal trials if police administrators carry out their responsibility for protecting constitutional rights. On the other hand, if police administrators fail in this effort; application of the exclusionary rule will continue. Furthermore, in addition to satisfying the concerns of both of these positions, we believe our proposal to be more effective and more realistic in achieving the basic judicial objective for the exclusionary rule, the deterrence of unconstitutional police conduct.

* * * * *

Mr. Chairman, thank you for providing to the members of the Police Executive Research Forum this opportunity to express our views on the exclusionary rule and certain proposed alternatives to it. The Forum is an organization of police chief executives from the nation's larger jurisdictions. Our goal is to improve the delivery of police services by promoting and bringing about the further professionalization of police executives and officers. We conduct research, engage in experimentation and provide a forum for debate on a wide range of criminal justice issues. It is our belief that, from these efforts, substantial improvement in the quality of law enforcement services will result.

The legislation under discussion today was developed in response to dissatisfaction with the effects of the exclusionary rule. We in local law enforcement confront the effects of the exclusionary rule continually; how the rule now operates in criminal proceedings disillusion us. Still, we do not think that any of bills S.101, S.751, and S.1995 offer the best means of remedying the ill-effects of the rule, or of achieving the rule's primary objective: to deter unconstitutional police conduct.

What we would like to recommend is a substitute process, one that will not only serve the purposes of the rule but will also broadly influence the improvement of policing. We envision a process by which the responsibility for deterring police violations of citizens' constitutional rights is given to police administrators; they can carry such responsibility most effectively; the judiciary can deter police violations only indirectly. The change in focus of the judicial sanction, from individual officers to their departments, will provide to police agencies the necessary incentive to institute programs for effectively deterring constitutional violations by their officers; that is because, if such programs are not implemented, the exclusionary rule will continue to be applied. If police administrators show that they can carry this responsibility, that they can execute it diligently, then the need to apply the exclusionary rule in individual cases will disappear, constitutional rights will be protected, reliable and relevant evidence will be used in trials, and the effectiveness of our criminal justice system will be enhanced.

Adopting our proposal to redirect responsibility for deterring police violations of constitutional rights from the judiciary to the police is risk free. In respect of those who believe that, to ensure true justice in criminal proceedings, the exclusionary rule must be eliminated or curtailed, our proposal provides satisfaction; it is

limited only by the potential of police administrators to protect individuals' constitutional rights. Regarding those who believe that the elimination or curtailment of the exclusionary rule means more police violations of individuals' constitutional rights, our proposal guarantees that the exclusionary rule will be applied whenever the judiciary determines that police departments are not ensuring that individuals' constitutional rights will not be violated. Our proposal guarantees that both agendas in the exclusionary rule debate will be accomplished. Each of the other proposed alternatives to the exclusionary rule forces an either-or choice: you are either for the exclusionary rule, or you are against it. Our proposal is better than the other alternatives, not only because it supports, at once, the interests expressed in both of these positions, but also because it more realistically provides for achievement of the judiciary's objectives in applying the exclusionary rule.

Objectives of the Exclusionary Rule and Problems Related to Its Application

The exclusionary rule was first enunciated in the 1914 Supreme Court decision, Weeks v. United States, 232 U.S. 383 (1914). The rule was devised as a remedy for violations of citizens' constitutional rights secured by the Fourth Amendment.

Initially, the Court held that this remedy applied only in federal prosecutions. Wolf v. Colorado, 338 U.S. 25 (1949). The Court left the states free to experiment with alternative sanctions for constitutional violations by law enforcement officers. Unfortunately, state and local officials, including those in law enforcement, did not heed the Court's warnings and failed to develop remedies that would secure compliance with the Fourth Amendment's provisions. The consequence of their inaction was the Supreme Court's 1961 decision in Mapp

v. Ohio, 367 U.S. 643 (1961), to extend the exclusionary-rule remedy to state courts.

The Rule's Objectives

The essence of the exclusionary rule is that evidence obtained in violation of Fourth Amendment requirements cannot be used against defendants in criminal proceedings. In Weeks and subsequent opinions, the Supreme Court offered a number of rationales for applying the rule, the major ones being, first, to maintain judicial integrity by removing the judiciary from the taint of partnership in unlawful behavior of law enforcement officers and, second, to deter future violations by prohibiting law enforcement officers from profiting by their lawless behavior. See, Weeks at 392 and Mapp at 648, 652, and 659-60.

Throughout the history of the exclusionary rule, the Court extended the rule's application beyond Fourth Amendment search and seizure violations to violations of the Fifth Amendment [United States v. Wolf, 388 U.S. 218 (1967)], the Sixth Amendment [Miranda v. Arizona, 384 U.S. 436 (1966)] and the Fourteenth Amendment [Irvine v. California, 347 U.S. 128 (1954)]. While the sanction was being extended, however, the judicial integrity argument lost its force as an independent justification. Today, the deterrence rationale is the predominant consideration in courts' decisions regarding suppression motions; judicial integrity is a consideration that is secondary to courts' assessments of whether or not the sanction will deter future violations. See, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Janis, 428 U.S. 423, 458-59 n.35 (1976); Dunaway v. New York, 442 U.S. 200, 218 (1979).

We believe that the deterrence rationale no longer provides a reasonable justification for the rule as the rule is currently applied. Though deterrence of unconstitutional police conduct is a goal we all seek to achieve, the exclusionary rule, by itself, does not constitute an appropriate means of achieving this goal.

By our criticism we are not suggesting that the rule has failed to assist in improving our system of justice. Two major benefits of the rule's application can be identified. The first benefit is that the rule has provided to defendants an incentive to challenge the propriety of conduct of law enforcement personnel; this has led to the judiciary's focusing on the requirements of constitutional behavior as these affect police. The second benefit is constituted by the indirect, long-range effects that these judicial rulings have had on police behavior; the educational aspect of decisions that have identified certain actions as improper have led police administrators to pay more particular attention to the requirements for constitutional procedure and, as a consequence, training of police officers has improved. Whether or not these two major benefits could have been realized without the rule, or under a different sanction, will never be known. Notwithstanding the benefits, the current level of dissatisfaction with the rule and the problems it presents require us to heed now the Court's warnings and find new ways to serve the purpose of the rule.

Ascertaining a means of measuring the deterrent effect of the rule as the rule is currently applied has proven elusive; this condition has intensified debate about the point at which a balance, if any, can be struck between the benefits of the deterrent effect and the costs to the criminal justice system and society. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 27 University of Chicago Law Review 665 (1970); Spiotto, Search and Seizure: An Empirical Study

of the Exclusionary Rule and Its Alternatives, 2 Journal of Legal Studies 243 (1973), Canon, Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Kentucky Law Journal 681 (1974); Comptroller General of the United States, Impact of the Exclusionary Rule in Federal Criminal Prosecution, Report Number GGD-79-45 (19 April 1979). Instead of further debating such issues, we want here to share our expertise as law enforcement administrators in the process of developing a suitable alternative to the rule. Abolishing the rule without substituting an effective mechanism for it amounts to a mere experiment, one in which we are not willing to engage. It is clear, however, that something must be done; the courts cannot do it themselves. We believe it is incumbent upon the law enforcement community to work with the judiciary and the legislatures to devise a suitable alternative.

Disadvantages of the Rule

Apart from doubts about whether or not the rule has achieved its objective of deterrence, use of the rule has led to several problems, some of which are more burdensome than those that the rule was originally intended to remedy. From the many problems discussed by commentators, we have deducted seven major arguments.

In a first line of argument it is posited that the exclusionary rule interferes with justice by distorting truth. Reliable, relevant evidence that would be admitted if obtained legally is excluded from the fact-finding process when obtained in violation of constitutional commands.

A second line of argument stresses that endlessly litigating the validity of searches, seizures and other law enforcement procedures causes delays in the trial process and diverts attention from questions

of guilt and innocence; focus shifts from alleged wrongdoings of defendants to allegations about police, vitiating attempts to provide swift and certain punishment for criminal activity.

A third contention is grounded in the following perception: respect that law enforcement personnel and citizens have for the law and our criminal justice system is destroyed by the rule. Instead of operating as a deterrent, the rule encourages some police officers to twist facts and stretch the truth about searches; there is the spectacle, too, of the guilty going free because of technical errors.

A fourth line of argument is based on assertions that the rule protects only those who face criminal prosecution, and that the rule cannot deter violations of constitutionally guaranteed rights when the police have either no interest in prosecuting or are willing to forego successful prosecution in the interest of pursuing other goals.

In a fifth line of argument it is charged that the rule fails to discriminate degrees of misconduct by police officers and degrees of harm done to victims of such conduct; regarding punishments, no rational distinctions are made between minor offenses and serious crimes or between honest mistakes and deliberate, flagrant violations.

A sixth argument is that the rule discourages internal rule-making and inhibits disciplining of errant police officers because there is fear that the very fact of punishments' being administered because of rule violations can itself be used as evidence to bolster defendants' cases for suppressing evidence obtained by illegal methods.

In a seventh line of argument it is submitted that the exclu-

sionary rule adds to the confusion about Fourth Amendment standards for reasonable searches and seizures. Trial court judges often tortuously construe the definitions of the Fourth Amendment so they can find that searches and seizures were reasonable and avoid the harsh requirement of excluding evidence. This gives rise to minute and often bizarre gradations in legal and illegal conduct, eliminating incentives to improve police procedures: incentives that could be provided by pointing out errors and penalizing officers.

The Forum's Alternative to the Exclusionary Rule

If an alternative to the exclusionary rule is to be acceptable, it must meet two objectives. First, it must operate as a deterrent to police misbehavior by providing a clear and understandable guide to proper conduct under the Constitution and by further providing incentive to take immediate disciplinary actions in response to violations. Second, it must remove those obstacles created by the exclusionary rule, which obstacles now prevent the guilty from being convicted, so that evidence of guilt can be used in trials.

Though deterrence of unconstitutional police conduct is the main rationale for the exclusionary rule, the effectiveness of the rule, as it currently operates, in achieving the goal of deterrence is in serious question. The apparent lack of deterrence results, in plain terms, from a lack of communication: the courts, in their rulings on motions to suppress, fail to communicate to police departments the specific requirements of the Fourth Amendment, and the police fail to educate the courts to the realities of law enforcement practices. Much of this owes to the fact that the exclusionary rule sanction is directed against individual officers.

Effective communication between the courts and the police is vital to making most productive our efforts to preserve constitutional rights. Abolition of the rule, or a good faith exception to it, will not solve the problem of poor communication. A process must be devised to ensure that police awareness of constitutional restrictions and of the necessity of operating within those restrictions is increased. We believe that directing the judicial sanction of exclusion away from individual police officers to police administrators will accomplish that objective.

As law enforcement executives, we know best how to deter our officers from improper conduct. In areas of officer misconduct other than constitutional violations, one such area being the unauthorized use of deadly force, experience tells us that improper behavior can be curbed by putting to use three tools in combination: rule-making, training, and discipline. For example: in his study of shootings by members of the New York City Police Department, Professor James Fyfe found that significant reductions in the amount of police use of deadly force were associated with the combined implementation of clear rules which guide officers in the use of force and of procedures to strictly enforce the rules. [See, Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 Journal of Criminal Justice, 309 (1979).] Currently, however, some police administrators fail to develop precise rules regarding Fourth Amendment procedures and fail to discipline officers for constitutional violations because they fear that such actions will be used against them in suppression hearings: the exclusionary rule as it is currently applied creates for police administrators a disincentive to accept responsibility for deterring constitutional violations.

What is needed is a process that eliminates disincentive and, simultaneously, provides to police administrators incentive to accept

responsibility for deterring misconduct regarding Fourth Amendment procedures.

The process by which we propose to meet these needs, especially the need to provide incentive, is one in which application of the exclusionary rule would be dependent upon the performance of police departments themselves. The concept is that the exclusionary rule would not be applied if the police department in question had taken seriously its responsibility to adhere to Fourth Amendment procedures. Departments could demonstrate proof of such good faith by meeting the following three requirements:

1. Publishing departmental rules and regulations that guide police on proper constitutional procedures;
2. Instituting effective programs to train officers according to these rules and regulations; and
3. Maintaining a history of disciplinary actions taken against officers, it having been demonstrated that the officers had committed violations of departmental rules.

The procedure by which this alternative would be implemented is as follows:

1. The judge would rule on whether or not the officer had committed a constitutional violation.
2. If the judge rules, yes, the prosecutor could then undertake to have the evidence admitted according to the following procedure: the prosecutor would ask the judge to review the police department's regulations, training programs and disciplinary history.
3. The prosecutor would have the burden of proving that the police met the three requirements (mentioned above) in a manner sufficient to ensure--
 - that the failure to provide a rule was reasonable, and that regulations specifying, and training in, the proper methods for proceeding in the particular circumstances under review would be immediately forthcoming; or
 - that, if the department already had a rule covering the circumstance, the officer would be disciplined

for violating the rule unless the officer was acting reasonably and in good faith; or

- that, if the departmental rule was found to be unconstitutional, it was promulgated in good faith, appeared reasonable before it was applied to the particular facts under review, and would be reissued in proper form.

Should the prosecutor fail in an attempt to prove that the department met the above conditions, the judge would exclude the evidence. [See, Kaplan, The Limits of the Exclusionary Rule, 26 Standard Law Review, 1027, 1050-52 (1974) for a similar proposal.]

We believe that rule-making, training and discipline constitute the most appropriate means for deterring Fourth Amendment violations, and that the emphasis we place on such means is well founded. To justify to you our reliance, I would like to spend a few moments discussing the effectiveness of each of these three components.

Rules and Regulations

The exclusionary rule, insofar as it was justified as a deterrent to police misconduct, was designed to ensure police conformance with constitutional requirements. In some agencies, however, the officer rarely learns of or understands the reasons for the exclusion of evidence, so the sanction fails in such instances to fulfill its objective. It can even be said that the rule has inhibited proffering of effective guidance to police officers: judicial reliance on and belief in the efficacy of the rule have led to the development of intricate, little understood rules of constitutional procedure and, regarding responsibility for officer direction, have diverted attention from police management to the judiciary, though the judiciary does not have a clear understanding of the daily operations of police agencies.

Administrative rule-making, from which would flow policies, procedures, and rules and regulations for structuring and controlling police conduct, has been advocated by numerous prestigious organizations and prominent spokespersons, some of which include the following: the American Bar Association [ABA Project on Standards for Criminal Justice, Standards Relating to the Urban Police Function §6.2 (1976)]; The National Advisory Commission on Criminal Justice Standards and Goals [Report of the Task Force on Police, §1.3, Commentary (1973)]; The National Advisory Commission on Civil Disorders, Report [310-11, 314 (1968)]; Chief Justice Warren Burger [Who Will Watch the Watchmen, 14 American University Law Review 1 (1976)]; Kenneth Culp Davis [Discretionary Justice-A Preliminary Inquiry (1971)]; Frank Remington, Herman Goldstein [Policing In a Free Society (1977)]; and Anthony Amsterdam [Perspectives on the Fourth Amendment, 58 Minnesota Law Review 349 (1974)]. In addition, the courts have frequently suggested the need for such rules. See, e.g., Delaware v. Prouse, 440 U.S. 648 (1979); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); and South Dakota v. Opperman, 428 U.S. 364 (1976). Some police departments have attempted to develop and implement such rules, among which departments are the following: Boston, Massachusetts; Madison, Wisconsin; and Washington, D.C. The rules provide clear, affirmative guidance to officers as to how they may proceed in a wide variety of complex situations; such rules contrast court decisions that restrict discussions to what an officer can not do and are rendered in a manner not usually understood by police officers. These rules address such procedures as execution of search warrants, searches incident to arrest, motor vehicle searches, stop and frisk, and eyewitness identification.

The incorporation of administrative rule-making into our alternative procedure provides several advantages over the exclusionary

rule, given the rule's current application. Courts would first focus on the procedures required by the rules and, second, on the past conduct of individual officers. This would redirect judicially-imposed responsibility for constitutional violations from officers to police administrators. Police officers, as with employees of any organization, are more likely to adhere to rules established by their agencies than to rules imposed from without by the courts. Developing clear, precise directives that are free of the legal terminology contained in many court opinions and that are written in language more easily understood by police officers could make the rules easier to understand and more likely to be followed.

Administrative rule-making would exert a broader influence on police operations than the exclusionary rule; its use within constitutional restraints would help in an array of law enforcement operations because police expertise would be utilized systematically and continuously. Judges, who lack law enforcement expertise, promulgate rules through an adversary process whose sole focus is on particular facts unique to individual cases. By contrast, police administrators, who understand the realities of police behavior, are able to fully grasp the implications of promulgated rules for all law enforcement needs. In developing rules, administrators would be able to utilize procedures best suited to the realities of law enforcement, while remaining within the confines of constitutional requirements. In addition, because many police activities are currently unregulated by the courts, i.e., activities not directed toward gathering evidence or leading toward prosecution, rule-making can lead to full definitions of rights of criminal suspects and other persons coming in contact with police. Finally, the visibility of the rule-making process would compel police administrators to make conscious assessments of law enforcement practices insofar as the practices relate to constitutional and other legal

requirements and would make administrators more accountable for decisions that should be based on such assessments.

The development of administrative rules regarding police procedure would have tremendous impact in helping to control police misconduct and in preserving constitutional values. Departmental rules governing activities of officers would be applauded by street officers; the rules would free officers from the vague and clouded language of court opinions; officers could look to police guidelines that set specific bounds of conduct. The courts could find either that officers were in violation of their departments' procedures or, in some instances, that the procedures at issue were unconstitutional, thereafter requesting that departments revise such procedures so that they meet constitutional requirements.

Police Training

Development of extensive rules guiding constitutional behavior will have little value if officers are not apprised of them. Publication of the rules, though an important first step in communication, is not sufficient. Officers must be taught how, and the circumstances under which, they may invoke police procedures. Training programs should be devised in such a manner that officers acquire not only the substantive information contained in departmental rules but also insight into ways in which they may, within constitutional limits, proceed with their tasks. The need for training is not limited only to police recruits. Continual revision of regulations, reflecting refinements in constitutional requirements, will necessitate that police officials develop in-service programs to re-train their officers in accordance with changes that are made. Finally, remedial training programs should be designed to reinforce proper procedures for those officers who have violated rules in the past.

Strict Police Discipline

Detering unconstitutional violations requires that officers be made aware that illegal behavior will not be tolerated; to make this known, an effective system of discipline must be instituted. Though precise rules and regulations are essential to defining kinds of behavior that will be subject to discipline, rules alone are insufficient. If rules are not properly enforced, their objective to conform police behavior to the provisions of the Constitution will not be achieved. A comprehensive system of internal police discipline, administered fairly and effectively, will promote observance of the rules.

Regarding deterrence, punishing officers for improper conduct has several advantages over the current exclusionary rule sanction. First, because of the relative immediacy and personal nature of disciplinary actions, officers would generally be aware that their conduct was in violation of constitutional requirements; given how the exclusionary rule is applied today (and depending on the agency), officers might not learn of or understand a court's rationale for excluding evidence; in any event, they would not be affected personally. Second, the publication of clearly defined rules, of penalties for violating them, and of the ramification of the disciplinary process would make it clear to the entire police force, as well as to the community, that certain behavior will not be tolerated. Third, police officer aversion to disciplinary action would cause officers to conduct themselves according to proper procedures. Fourth, a system of discipline could introduce the concept of gradations of improper behavior. The exclusionary rule operates uniformly and imposes an inflexible penalty for all violations, minor or major. An effective disciplinary system could apply a variety of penalties tailored according to the seriousness of misconduct. Finally,

sanctions that result from enforcement of rules and regulations could be applied with much greater frequency than the exclusionary rule sanction; only a small percentage of investigations, searches, arrests and interrogations now reach the trial stage.

**Why the Alternative Process Proposed by the Forum
Is the Most Effective Method to Deter
Fourth Amendment Violations**

The alternative the Forum proposes is a complete package that must be viewed as a whole: the components are interweaved; each one complements the others; implementation of one component alone will provide neither an adequate substitute for the exclusionary rule nor relief from the problems currently surrounding the rule's use.

The key to the Forum's alternative is placing with police administrators responsibility for ensuring police officer compliance with constitutional requirements. Internal regulation is the most effective means by which police misconduct can be deterred. Police managers, as opposed to persons outside the agency, have greater understanding of police officer behavior and of the culture of the law enforcement community and are, therefore, more effective in causing officers to understand and comply with constitutional procedures.

If police departments realize that their efforts are to be rewarded by the admission during trials of evidence that might previously have been excluded, they will be strongly motivated to formulate rules and to institute training and discipline. Departments that develop rules and regulations in compliance with the Constitution will not be restrained by the straitjacket of suppression motions. An objective test for determining whether or not departments have developed internal regulatory mechanisms to deter police violations will be applied by the courts. Judges will simply look to departments'

good faith efforts to establish effective rules and to institute training and disciplinary systems, allowing evidence into courtrooms if departments pass the objective test. In effect, the court will be turning over to police departments the responsibility for disciplining police officer misconduct, while holding departments responsible for their policies on constitutional rights.

The procedure for determining whether or not the exclusionary rule would be applied in an individual case involves the following steps:

1. If a department has a rule governing the practice under court scrutiny, which rule is found to be constitutional, and if an officer complied with the rule, the evidence obtained as a result of the procedure would be admitted in the case.
2. If an officer fails to comply with a department's constitutional rule, and if the department has a history of disciplining its officers for violations, the evidence would likewise be admitted. Under such circumstances, the officer would be disciplined directly by the department rather than indirectly by the court.
3. If a rule is found to be unconstitutional, the court would look at whether or not the rule was promulgated in good faith and in the reasonable belief that it complied with constitutional requirements. Furthermore, if a department has a history of training and disciplining its officers for violations, that department would merely be required to re-promulgate its rule according to proper procedures, deterring future violations while providing the benefit of use of the evidence in the immediate trial. If a department failed to meet these tests, the evidence would be excluded from the trial.

To provide an example of how this process would operate in an actual case, I will use the facts of United States v. Adams, 621 F.2d 41 (1st Cir, 1980); these facts were discussed in the testimony of Professor Leon Friedman before this subcommittee several weeks ago. In that case, FBI agents had information regarding the possibility that an escaped murderer was living in the house of a former cellmate. This information was corroborated on a Wednesday by a social worker who

had visited the residence. On Thursday at 8:30 a.m. the agents again questioned the social worker to see if the escaped convict was still there and found out she was. At 9:50 a.m., seven FBI agents went to the house and, after searching the premises, arrested the fugitive without having obtained either an arrest or a search warrant.

In the trial of the former cellmate for harboring a fugitive, the court excluded the evidence that the fugitive was there. The court found that there were no exigent circumstances to justify a warrantless arrest or search, stating there was ample time to obtain a warrant.

As in the case of an officer's entry into the home of a suspect to make an arrest, the court found that, absent exigent circumstances or without consent, the Fourth Amendment requires that a police officer must obtain a search warrant before entering the home of a third party to execute an arrest warrant. Thus, under the exclusionary rule as it currently operates, the evidence was excluded from the trial because of the FBI agents' failure to abide by the Fourth Amendment requirements.

Assuming for the moment that the Forum's proposed process were in place, the evidence in this case would not necessarily be excluded. The court would first find out whether or not the FBI had promulgated a rule covering an arrest in the home of a third person, i.e., whether or not a search warrant should first have been obtained. If the court found that the FBI had no rule, the evidence would be excluded. The Bureau, having failed to carry its responsibility for deterring constitutional violations by promulgating a rule, would be responsible for the possible lost prosecution were the evidence to be excluded.

If, however, the court found that the FBI had a rule calling

for a search warrant in these circumstances and that the agents violated it, the court would ask the following two questions:

1. Does the FBI conduct a program to train its agents to follow the appropriate procedures for searches and seizures as outlined in its periodically updated rules?
2. In the past, has the FBI disciplined those officers who were found to have violated its search and seizure rules?

If the answers to these questions were, yes, the court would admit the evidence into the trial, stating for the record its reasons for doing so; the FBI would be found to have carried its responsibility for deterring agent misconduct; FBI-imposed discipline would have supplanted the utility of the exclusionary rule as the rule is currently applied.

Advantages of Internal Regulation Required in the Process Proposed by the Forum

In our alternative, the focus of attention shifts from individual officers to police departments. If departments make good faith efforts to define and enforce constitutional behavior, evidence resulting from investigations should not be suppressed. Use of evidence gathered in criminal proceedings will restore the confidence of the police and the public in the criminal justice system. A balance between rights of criminal suspects to be protected from intrusive police behavior and rights of citizens to be protected from criminal acts will be restored.

Once implemented, our comprehensive approach to handling constitutional violations by police officers should prove to be the most appropriate substitute for the exclusionary rule. Placing responsibility for constitutional violations on police administrators is the most

logical method for deterring police misbehavior: rules and regulations will provide effective guidance to officers, while strict internal disciplinary procedures will ensure that discipline is more frequently applied than is now possible under the exclusionary rule. With clear departmental rules there will be less question as to when officers are in the wrong so that administrators will feel more comfortable in applying discipline. Regarding punishment, our system will allow for distinguishing gradations of violations. The development of explicit, comprehensive rules and regulations by police departments will provide a way of clearly spelling out the meaning of constitutional requirements, taking into account the realities of law enforcement practices. The introduction during trials of evidence that might previously have been excluded will increase chances that criminals will be brought to justice. The focus of the trial will shift back to alleged wrongdoings of defendants, increasing the likelihood of swift and certain punishment for criminal activity. The police and the public's respect for the law and the criminal justice system will increase; and what is most important, citizens will be protected, before the fact, from illegal police conduct in all areas of law enforcement activities--even those activities not involving evidentiary matters--because of the deterrent effect of this approach.

Gradual Replacement of the Exclusionary Rule

Incorporating the three components of rule-making, training and discipline into a single, comprehensive alternative can lead to eventual replacement of the exclusionary rule, eliminating the problems the rule has engendered. Immediate implementation of our alternative will provide partial relief from the exclusionary rule's disadvantages and, eventually, could completely supplant dependence on the rule as a

means of deterring unconstitutional police behavior; use of the exclusionary rule, however, will continue until our alternative has proved itself worthy. Determining when to apply the rule will, nevertheless, become easier; using an objective test for determining departments' good faith efforts will simplify the rule's use. Only after our alternative has been proven to be an effective substitute for the rule will the rule be discontinued. In effect, the exclusionary rule simply will atrophy.

The exclusionary rule is an integral part of the Forum's alternative. The prospect of its elimination is an incentive for police departments to develop effective controls over unconstitutional behavior of officers. Use of the exclusionary rule as an incentive to develop internal regulation of unconstitutional behavior is similar to use of the bail-out provision in the Voting Rights Act Amendments currently before Congress. Under the bail-out provision, if a jurisdiction remains free from discriminatory violations for ten years, it will no longer be subjected to pre-clearance by the Department of Justice for its changes in election procedures. Similarly, under our proposed procedure, if a police department demonstrates a pattern of good faith efforts to deter unconstitutional behavior, it will be freed from the constraints of the exclusionary rule.

As experienced law enforcement executives, we firmly believe that internal regulation of law enforcement practices is the best possible approach to deterring unconstitutional violations. We are not, however, unrealistic; our belief must not lead to overconfidence. Though the measure of professionalism in law enforcement has increased remarkably over the years since the Mapp decision, many more improvements must be made. The process of improvement will necessarily be gradual. At first, most police departments could not fully meet changed standards without making extensive changes. Developing rules

and regulations for conforming police conduct to constitutional safeguards will be a monumental task. Some departments will have to restructure their disciplinary systems extensively.

Nonetheless, police departments will gradually adopt extensive and comprehensive rules regarding constitutional procedures and will begin to take appropriate disciplinary action against officers who violate these rules. Some departments will initiate these modifications on their own; others will do so under pressure from prosecutors, the media and the public to lift the burden of the exclusionary rule.

Current Legislative Solutions

Though the underlying philosophy of S.101, S.751, and S.1995 is that something must be done about the current operation of the exclusionary rule, we believe that none of these proposed alternatives will provide an effective solution to the problem. Before commenting on these proposed alternatives, however, one cautionary note should be raised: the ill effects of the rule should not be confused with the restrictions imposed by the Constitution. It is often argued that the rule handcuffs police in enforcing the law. It is not the rule but, rather, the Constitution itself that quite properly creates obstacles for overzealous police officers. The increased judicial scrutiny that followed the rule's introduction has created for some, the illusion that, if the exclusionary rule were abolished, many of the constitutional restrictions imposed on police would also be abolished. This is a gross misconception: abolishing the current rule would not do away with the constitutional provisions prohibiting illegal search and seizure. The fundamental principles of the Constitution must, of course, be preserved. An alternative's only function is to change the remedy used when violations occur, while providing a mechanism that promotes police adherence to constitutional requirements.

S.751

S.751 attempts to deter constitutional violations by providing for use of a damage remedy and disciplinary action. Though well-intentioned, we believe this alternative will fail in practice. Like current civil remedies, the damage remedy of S.751 is mainly illusory. There are several reasons for this. First, few suits, especially in comparison to the number of violations, will likely be brought: bringing and maintaining a civil action is expensive, burdensome, and time consuming. Currently, overcrowding of court dockets delays the hearing of federal court cases by an average of 13 months and the hearing of state court cases by up to seven years. Victims of illegal practices, who are not themselves involved in criminal behavior, would consequently have less incentive to challenge the police than criminal defendants. Bringing suit would consume a vast amount of a plaintiff's time and could lead many to believe it would not be worth the effort. The infrequent bringing of such suits would result in less judicial review of police practices and, what is more, less guidance for police.

Second, often the only witnesses to an event are the plaintiff and the defendant officer; in such instances the issue becomes one of credibility. Because juries tend to be sympathetic toward police officers confronted with liability, awards against the police might be infrequent. Third, for those plaintiffs who do prevail, compensation will likely be pathetically meager. Because the measure of damages will simply be the extent of physical injury to the plaintiff or to property, the careful officer could avoid all but nominal damages. Moreover, the remedy does not take into account the damages suffered by plaintiffs owing to invasion of their privacy. Fourth, the damage remedy provides little direct incentive for police to develop internal rules. The deterrent effect would amount to

little more than what is already provided by the rule applied today.

Though the damage remedy might serve better to compensate victims of constitutional violations than current civil remedies, it would not satisfactorily replace the exclusionary rule. Because such civil actions would be infrequently brought, they would not serve to systematically highlight police misconduct. More importantly, the remedy comes after the fact of the violation; it does not provide adequate incentives for establishing means of deterring misconduct before it occurs.

The disciplinary remedy proposed in S.751 is inadequate for similar reasons. Little incentive is provided to agencies to impose systems that consistently control misconduct. In addition, the remedy would, as the exclusionary rule now does, constrain law enforcement practices by telling officers, in effect, what they cannot do instead of emphasizing what they can do. Without clearly drawn internal rules, officers will remain ignorant of how they should properly proceed; administrators will be hesitant in imposing strict disciplinary measures.

S.101

The thrust of S.101 is to limit the application of the exclusionary rule to those instances in which it is believed that individual police officers will be deterred by its application. A similar purpose is found in the recommendation of the Attorney General's Task Force on Violent Crime to exclude "good faith" efforts from the rule. The rationale behind both of these proposed alternatives is that, when police officers make reasonable, good faith efforts to comply with the law but unintentionally fail to do so because of minor technical

violations, it is difficult to find any deterrent effect in suppressing the evidence that was wrongfully obtained; under such circumstances, excluding the evidence from trial has little effect on officers' future behavior; it merely allows defendants to benefit and undermines public confidence in the criminal justice process. This alternative, though sound in theory, will be cumbersome in practice; its effect will likely be to undermine the deterrent purpose behind the rule, possibly leading to an increase in constitutional violations.

Under S.101, determining how to apply the rule will require an extremely involved fact finding process, irrespective of whether the standard operates on intent, substance or good faith. Judges will be given the difficult task of examining the inner thought processes of officers to determine their true intent. Far from reducing the amount of fact-twisting that is alleged now to take place during suppression motions, this alternative would promote officer dishonesty regarding what were their true motives for acting. Dependence on discerning the subjective intent of officers would lead to departmental toleration of officer ignorance and would inhibit development of procedures to guide officers regarding proper behavior. As for those elements outlined in S.101 that must be verified before findings of substantial violations can be issued, the intricacies of determining the proper weighting of factors would protract criminal trials.

S.1995

S.1995 combines elements of both S.101 and S.751. It limits application of the exclusionary rule to cases of intentional or grossly negligent violations. With respect to the intentional violation standard of S.101, we believe that S.1995 is freighted with the same problems; it is cumbersome and runs contrary to the purposes behind the rule. Though this bill is similar to the recommendation of the

Attorney General's Task Force insofar as the bill includes a reference to the reasonableness of an officer's good faith belief, thereby incorporating an objective standard, the difficulty in determining officers' subjective good faith remains because the good faith standard focuses only on individual officers and fails to redirect responsibility for constitutional violations. Though S.1995 provides a damage remedy against the government for constitutional violations, such a corrective measure will not satisfactorily replace the exclusionary rule for the reasons we discussed when referring to S.751.

None of these three pieces of legislation addresses what we believe is the most important consideration in devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure with certainty that constitutional violations are minimized. What is needed is a means of testing the good faith efforts of department administrators; such efforts are susceptible of objective measurement. Basing a test on individual officers' subjective intent in particular cases is not likely to prove productive. The Forum-developed alternative includes the necessary means of testing police administrators' good faith efforts. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional behavior can be gauged. Once departments have passed muster under this objective test, the exclusionary rule will not be applied.

Conclusion

As law enforcement executives who are responsible for the actions of our officers, accountable to the public, and answerable to the law, we believe that our alternative will deter constitutional violations by police officers and enhance the effectiveness of the criminal justice system. Under the process we propose, replacement of

the exclusionary rule would come gradually; as the effectiveness of our process was proved, its use would gradually increase. Critics would no longer be able to complain of an artificial rule handcuffing the police in their efforts to fight crime. The key to removing the handcuffs would be placed in the hands of the police themselves. The task of establishing this alternative means of controlling police misconduct would be a time-consuming and arduous one. Judicial hearings on departmental rules, training and discipline systems would be extensive, especially in the beginning. Once the internal control systems were in place in police departments and their effectiveness in deterring unconstitutional behavior by the police was demonstrated, we believe the rewards would prove to have been well worth the effort. The alternative we have devised will best satisfy the primary purposes of the exclusionary rule and most effectively counter problems stemming from the rule's current use. These effects will promote the ends of justice and help to preserve our Constitutional liberties.

Senator GRASSLEY. The next day for hearings will be next Thursday, the 25th.

I will adjourn this meeting.

Thank you all very much for your participation.

[Whereupon, the subcommittee was adjourned at 3:40 p.m.]

THE EXCLUSIONARY RULE BILLS

THURSDAY, MARCH 25, 1982

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 2228, Dirksen Senate Office Building, commencing at 2:15 p.m., with Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Also present: Senator Specter.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The subcommittee will come to order.

Today the Subcommittee on Criminal Law begins the fourth day of these hearings on several legislative proposals to either limit or to abolish or to otherwise modify the fourth amendment exclusionary rule as far as Federal prosecutions are concerned.

The three specific proposals before us are S. 101, which is Senator DeConcini's proposal to limit the exclusionary rule to cases of willful or substantial violations of the fourth amendment; S. 751, which would abolish the exclusionary rule entirely and replace it with a civil damage remedy, which is the proposal of Senator Thurmond and Senator Hatch; and S. 1995, which is an omnibus anti-crime bill introduced by Senator Dole, which contains a provision that would limit the rule to intentional bad-faith violations of the fourth amendment and would provide a civil damage remedy for such violations. Additionally, last week Senator Thurmond introduced S. 2231.

I must say I hesitate to use these bill numbers because people come up to me on the street and say "How is S. 2231 doing?" and I do not have any idea what they are referring to.

But Senator Thurmond's new bill is, in effect, the Department of Justice's good-faith exception proposal.

The issue of good faith has come up repeatedly in these hearings, and it presents the subcommittee with one more alternative to consider should we decide that some alteration of the exclusionary rule is No. 1, possible, and, No. 2, desirable.

So, as we continue the discussion today we are confronted really with two issues, two major issues: whether the exclusionary rule is constitutionally mandated, or whether it is a judicially created doctrine subject to congressional alteration; and, then, sequentially, if the rule is susceptible to congressional alteration, which of the al-

ternatives that I have outlined would better serve the goals of the fourth amendment.

So, these are very difficult questions. And we are fortunate today to have the benefit of the views of an outstanding group of witnesses.

I believe it has been agreed that we will proceed by way of panels. And the first panel will consist of Professor La Fave and Professor Blakey.

STATEMENT OF A PANEL CONSISTING OF PROF. WAYNE LA FAVE, UNIVERSITY OF ILLINOIS SCHOOL OF LAW, AND PROF. G. ROBERT BLAKEY, NOTRE DAME SCHOOL OF LAW

Professor LA FAVE. Mr. Chairman, I am very pleased to have this opportunity to appear here today to present my views on the various proposals to which you have referred.

Mr. Klipper has kindly sent to me copies of the testimony which you have received on earlier occasions. Insofar as is possible, I shall try not to repeat the points which have already been made by other witnesses.

With respect to S. 101 and S. 751, I would simply note that I endorse completely and enthusiastically the constitutional and policy objections to those bills that were raised earlier by Attorney General Sachs of Maryland and by Professor Greenhalgh on behalf of the ABA.

Therefore, for the next few minutes I would like to address another proposal which, as you have noted, has come before your committee recently, and that is the proposal from the Justice Department for a good-faith exception to the exclusionary rule.

As you know, Mr. Chairman, that proposal was put forward last August by the Attorney General's Task Force on Violent Crime, and was adopted by the fifth circuit in 1980 in the now-famous case of *United States v. Williams*.

On superficial examination, this good-faith test seems quite simple, straightforward, and especially appealing. After all, if the police officer thought he was doing the right thing, what is to be gained by suppressing the evidence? I would like to suggest to you, however, that a closer examination of this proposal makes it unmistakably clear that such a legislated exception to the fourth amendment exclusionary rule is unnecessary, unsound, and I think in all likelihood unconstitutional.

By way of explaining why I feel this way, it may be useful to begin with the question of exactly what state of mind a police officer would have to have to justify giving his conduct the appellation good-faith.

Of the possibilities, ranging from the mere absence of a subjective evil intention to commit a fourth amendment violation to the presence of a reasonable belief that the conduct is lawful, most supporters of a good-faith exception claim allegiance to the more cautious and limited reasonable man standard.

I think it is a matter of some concern, however, that the rationalization that has been offered for doing such surgery on the exclusionary rule substantially outruns the limitation when stated in that form.

In the *Williams* case, for example, the new rule was first stated with a reasonableness limitation, but that is immediately followed by the assertion that "the exclusionary rule exists to deter willful or flagrant actions by the police" and that "where the reason for the rule ceases, its application must cease also," and then for emphasis it is later declared that a "police officer will not be deterred from an illegal search if he does not know that it is illegal."

It is little wonder then that 10 other judges in the *Williams* case were moved to respond that:

If this is correct, it appears needless to require that the police officer's subjective good faith also be objectively reasonable. A policeman who is in complete subjective good faith is unlikely to stop to ask himself, Am I also reasonable?

It seems to me that this is a very logical conclusion if one begins with the view of the *Williams* case, also the view of the Justice Department, concerning the exclusionary rule's deterrence rationale. But I submit to you that this is a wrong conclusion precisely because it is grounded in an erroneous view of what the deterrence rationale is all about.

The truth of the matter is that the good-faith exception to the exclusionary rule would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him.

To put the matter somewhat differently, if at a suppression hearing it is shown that the arresting or searching officer acted illegally because of an insufficient understanding of the fourth amendment's limits on his power, this is hardly a case for withdrawing the exclusionary sanction on the ground that the policeman was not in a condition to be deterred in this case. Rather, it is an especially compelling case for applying the exclusionary rule so as to encourage the taking of such additional steps as will enhance police understanding of these fourth amendment limits.

I would add that this is true even if we are prepared to say that from the limited perspective of the particular officer in the particular case the arrest or search was a reasonable or understandable thing to do.

Now, the full import of that last remark can best be seen by considering a related body of law; that concerning so-called constitutional tort actions undertaken against police by those claiming to be the victims of illegal search and seizure. In that area the Supreme Court has held that if the jury finds that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was, in fact, unconstitutional.

It seems to me that such an approach to the question of whether the officer should be personally liable is a most sensible solution.

Now, what exactly does that have to do with the issue of whether a good faith limitation should be appended to the exclusionary rule?

Well, as far as the proponents of this proposal go, it has absolutely everything to do with it. They find a perfect analogy between existing law in this constitutional tort area and what they believe the law ought to be in an exclusionary rule context.

Thus, for example, Justice White has asserted that:

If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf.

Likewise, another commentator has reasoned that the analogy is sound because of a common purpose of the tort remedy and exclusionary rule. He says:

Both seek to isolate those aspects of the officer's conduct that may justifiably inculpate the officer and reasonably subject him to civil or exclusionary sanctions.

But comments such as these, it seems to me, reflect a profound misunderstanding of what the exclusionary rule's deterrence function is all about.

In a tort action, if we could just focus on that for a moment, the Supreme Court has instructed that the objective is not merely to provide compensation to the victim of the search, but to serve as a deterrent against future constitutional deprivations. But certainly in the context of a tort action, where we have the plaintiff, the search victim, and the defendant, the police officer, there are limits on how far we are prepared to go in serving those objectives. If the defendant, the officer, has performed reasonably, we leave the cost of the harm on the plaintiff, where the fates placed it, and similarly we are not prepared to make the reasonable defendant respond personally in damages merely in the interest of deterring others.

Now, consider, if you will, the criminal case in which the exclusionary rule issue arises. It no longer makes any sense to say that the policeman's good faith, not unlikely attributable to either erroneous or inadequate training by his department, must control so that the officer is not unfairly mulcted in damages.

Contrary to the assertion of the commentator I quoted just minutes ago, exclusion is not a sanction to which the officer is personally subjected, but rather is a sanction that is imposed upon the system.

And, contrary to Justice White's assumption, exclusion of evidence is not a benefit conferred on the defendant, as he said, "solely on his behalf", as might be said of tort damages. Rather, the defendant is at best an incidental beneficiary when exclusion occurs for the purpose of deterrence. I am talking about the kind of deterrence that the Supreme Court described in *Stone v. Powell*, when they said there is a need to remove the incentive to disregard the fourth amendment so that the frequency of future violations will decrease.

Now, what this means is that whether the officer who made the challenged arrest or search was sufficiently informed about relevant fourth amendment principles so that he could have been deterred is beside the point because that is not the kind of deterrence we are talking about. That is not the kind of deterrence the Supreme Court has been talking about. The exclusionary rule is not aimed at special deterrence of an individual officer since it does not impose any direct punishment on a law enforcement official who has broken the rule. Rather, we are talking about general deterrence or, as some commentators have put it, systemic deterrence. We are trying to deter the system in a variety of ways from infringing on fourth amendment rights.

Now, once it is appreciated that this is the kind of deterrence we are talking about, it becomes apparent, to me at least, that the dimensions of the debate concerning these proposals for a good-faith exception are changed dramatically. The argument for application of the good-faith exception, it seems to me, is absolutely unfeignable in the common situation I described earlier; namely, that in which the officer's violation of the fourth amendment in good faith is reasonable as to him because he has been insufficiently or incorrectly trained. A failure in such circumstances to apply the exclusionary rule would communicate an unmistakable message to society at large and to law enforcement supervisors; namely, that there really is no need to expend the money or time that is needed to adequately train the police.

And thus I submit that if any kind of good-faith exception to the exclusionary rule were to be created, it would of necessity have to be grounded in a uniquely narrow conception of what constitutes the requisite good faith.

As stated by the fifth circuit in the *Williams* case, the necessary belief "must be grounded in an objective reasonableness" and "must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained"—I think that language is very important—"and reasonably trained, officer to believe that he was acting lawfully."

To apply the exclusionary rule when an individual officer oversteps his bounds but not when the violation of the fourth amendment is caused by systemic defects, it seems to me, would be to turn the fourth amendment on its head.

Now, whether creating this kind of narrow good-faith exception to the exclusionary rule would be worth the candle is the next question. It naturally leads to two other inquiries:

One, what kinds of errors falling within this good-faith exception are not already adequately accommodated under existing fourth amendment doctrine?

Two, what consequences could be anticipated if the exclusionary rule were so narrowed?

As to the first of these, one type of error sometimes highlighted by advocates of a good faith exception is that which occurs when an officer understands the applicable law, but has made a mistake in judgment as to the applicable facts. In that kind of case it seems to me there is no need to tamper with the exclusionary rule at all because the fourth amendment, in terms of its prohibitions, is already inapplicable to that kind of situation.

This is most apparent as to the fourth amendment's probable cause standard, for probable cause exists even when the police have made a reasonable factual error, and reasonable factual mistakes are also generally tolerated under existing fourth amendment law with respect to police decisions on whether a warrant or even probable cause is required.

Therefore, it is necessary to turn our attention only to those cases which can be called reasonable mistakes of law, and here there are a variety of situations.

Consider, for example, a case in which an officer has made an arrest for violation of a substantive statute which is thereafter found unconstitutional. Surely, it might be argued, it makes no

sense to exclude evidence obtained incident to that arrest, for admission of the evidence is hardly an inducement to future wrongdoing. But it is well to note that the Supreme Court has already solved that problem. In 1979 in the case of *Michigan v. DeFillippo*, the Court held that in that kind of case the arrest is lawful simply because it falls within the traditional definition of probable cause.

Now, if I may, let me put a variation on the *DeFillippo* case, and that is a case in which the officer once again relies upon a statute. This time it is a statute which purports to define the officer's fourth amendment powers. But it is later held that this statute is unconstitutional because it defines the authority of the police too broadly.

Here again the police officer has acted in good faith, and here again, the Justice Department argues the individual officer, the particular officer that makes the arrest or search, could not have been deterred and, therefore, there is no occasion to apply the exclusionary rule.

I would submit to you that once again that conclusion is based upon a mistaken view of what the deterrence function is all about. Here again, the dispute is not between the arresting officer and the defendant, but rather between the defendant and the Government, and the Government, after all, is responsible for the actions of its legislative bodies as well as for the actions of the police.

I might note that the Supreme Court has so held time and time again.

Yet another situation is that in which the arresting or searching officer has in a sense acted in good faith in that he complied with the fourth amendment law as it existed at the time, but a subsequent judicial decision would make the officer's conduct unconstitutional in some respect.

Though again one might doubt that anything would be achieved by exclusion, that problem has already been addressed by the law on retroactivity. The Supreme Court has consistently held that new fourth amendment rules operate prospectively only.

I might just add to that the observation that obviously the defendant in the particular case where the new rule is established must prevail, for otherwise there would be no case or controversy and no incentive for any defendant to seek recognition of any new rule.

Now, what all this means is that there is, as far as I can tell, only a single fact situation which might even arguably support a good-faith exception, and that is where an adequately trained and properly motivated officer errs in applying a valid and preexisting legal principle to a particular set of facts.

In favor of the good-faith exception, it can be argued that in that particular instance the entire criminal justice system has functioned reasonably and consequently exclusion would not aid the deterrence objective at all.

I must say that I am, however, persuaded by a contrary line of reasoning and by what I see as the likely consequences in practice were a good-faith exception to the exclusionary rule adopted.

There are four adverse consequences I foresee, and I would like to simply list them rather quickly.

First: It seems to me that adoption of the good-faith exception would stop dead in its tracks judicial development of fourth amendment rights. The reason for this is that if evidence is to be admitted in criminal trials in the absence of a clear precedent declaring the search to be unconstitutional, then, of course, the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case which is clearly in point. Indeed there is clear precedent supporting this notion that the Court is to avoid decision of a constitutional issue when the evidence will be admissible in any event.

Second: I believe that adoption of the good-faith exception would impose on suppression judges a heavy burden—indeed, I think it would be an intolerable burden—of making exceedingly difficult decisions on a regular basis.

For one thing, because the good-faith test has an important subjective element, it would be necessary for the suppression judge in each case to probe the subjective knowledge of the officer who made the arrest or the search. But the inquiry could hardly stop there, for, as I noted earlier, a conception of good faith which is arguably consistent with the exclusionary rule's deterrence function must be focused more broadly than the individual officer. Therefore, we are talking about a task which would be unduly burdensome and a task which would intrude into the suppression process a factual issue on which evidence will be hard to come by apart from the officer's self-serving and generally uncontradicted testimony.

Indeed, I think it is well to note that our experience over the years tells us something on this point. What experience we have had in the fourth amendment exclusionary rule area, with inquiring into subjective states of mind, rather convincingly shows that the less frequently such inquiries are made the better off we will be.

I refer to the experience under that line of cases permitting an otherwise valid arrest or search to be drawn into question by a showing of bad faith by the officer, which certainly has proved that the catch is not worth the trouble of the hunt.

As some members of the Supreme Court said some years ago: "Sending courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."

Now, some proponents of the good-faith exception have attempted to blunt such arguments by noting that their test also contains an objective reasonableness component. But, of course, that is an additional requirement, not a substitute for an inquiry into the subjective state of mind, and it is an additional requirement which itself would be most troublesome.

The question again is: What kind of error concerning the law of search and seizure would be made by a reasonable officer? It seems to me that is an exceedingly complex and difficult kind of judgment to call upon a judge to make in case after case.

Third: I believe that adoption of the good-faith exception would likely result in a distinct antifourth amendment bias in suppression rulings. This is a natural consequence of making the suppres-

sion decision ride on a rather amorphous standard involving, as I have said, these exceedingly complex and unresolvable issues.

What I think it would mean in practice is that appellate courts would defer to trial courts and trial courts would end up deferring to the police.

Fourth: I believe that admission of illegally seized evidence under a good-faith exception would be perceived by the police, and indeed by the public at-large, as giving the police a license to engage in the same kind of conduct in the future.

The essential point was made by the Supreme Court some years ago in *Terry v. Ohio*. The Court said:

A ruling admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

The notion, therefore, is not that the police are inherently evil, but rather that because they are engaged in the often competitive enterprise of ferreting out crime, they are no less likely than the rest of us to equate admissibility with legality. Thus I find it not at all surprising that a very recent empirical survey of police attitudes has found that to the police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation.

For all these reasons, Mr. Chairman, I believe that a legislated good-faith exception to the exclusionary rule would not be a wise move for the Congress.

I also believe that such legislation might well be held unconstitutional, though quite clearly no one can assert unequivocally either that such a statute would be constitutional or that it would not be.

Five members of the present Supreme Court, in one context or another, have indicated some sympathy for the good-faith exception. But I think that hardly settles the matter, for those comments were made without the advantage of briefs and arguments.

The fourth amendment exclusionary rule is, after all, constitutionally grounded. Otherwise, it could not for all these years been applied to the States. Therefore, the only rational argument that I can see for a good-faith exception to the exclusionary rule is the one that was presented to you earlier by Assistant Attorney General Jensen; that an exclusionary rule so limited would be consistent with the dominant function of the rule, namely deterrence.

The thrust of my remarks for this afternoon has been that actually a good-faith exception to the exclusionary rule would conflict with the deterrence objective as defined by the Supreme Court in *Stone v. Powell*, and, therefore, even under the theory that Mr. Jensen has put before the committee, I think a sound argument can be made that the good-faith exception would, in fact, be held unconstitutional. Thank you.

Professor BLAKEY. Mr. Chairman, my name is G. Robert Blakey. I am a professor of law at the Notre Dame Law School.

I think it might be perhaps helpful to the committee to set out some of my background.

I have for approximately 20 years been involved in one capacity or another with the Federal system of criminal justice.

I was for approximately 5 years a prosecutor in the Department of Justice, in which I responded, on a routine basis, to motions to suppress.

Subsequently, I was a law professor at Notre Dame and a counsel to this committee. While a counsel to this committee, I wrestled with the members of this committee about the very difficult problems associated with controlling electronic surveillance, asking what sorts of criminal, civil, and exclusionary systems might control the use of those techniques in the administration of justice to both protect privacy and advance legitimate law enforcement concerns.

I had a similar experience with the American Bar Association standards in the area of electronic surveillance.

I have from time to time as a law professor represented private clients, where I have filed motions to suppress.

What I am suggesting is that I have both responded to and filed motions to suppress and studied and thought about them. The thoughts I share with you today are, therefore, the product of approximately 20 years of wrestling with precisely the issues that this committee has to face.

I would be less than candid with you if I told you that over time I was of one mind on the subject. I have from time to time changed my mind as to what should be done and how it should be done, and I suppose that as long as I am alive, and hopefully intelligent, as new information and arguments are brought to my attention, I will continue to change my mind. Therefore, I hope I shall never have to explain these remarks in any other context, but simply to suggest to you that this is the best wisdom that I have for you this afternoon.

Senator MATHIAS. I am sure that I do not have to remind you of the old admonition though: that mine enemy should write a book.

Maybe you have no enemies and, therefore, you do not have to worry about it.

Professor BLAKEY. If you will notice, Senator, with a great deal of discretion, but nonetheless in violation of the committee's rule, I have not filed a written statement.

As I see the issues before you, Senator, they are, No. 1, basically and broadly, how free are you to do anything?

Number two: Assuming you are free, what should you do?

That ranges on one end from the abolition of the rule to the other end some sort of modification, the principle one being presented to you is some variation of a good-faith rule.

Let me address myself first to how free you are.

It is my judgment, Senator, that the exclusionary rule is not, in fact, grounded in the Constitution. I find nothing in the language of the fourth, fifth or sixth amendments or the due process clause that explicitly suggests that evidence taken in violation of it should be suppressed.

I find nothing in the history of the intent of the framers or the jurisprudence that developed immediately after the Bill of Rights that would suggest that the remedy to be formulated to protect the basic provisions in the Constitution is itself mandated by the Constitution.

Indeed, I would draw to this committee's attention and what I would suggest to you is the forgotten precedent. In most of the literature that I have read discussing the suppression rule, it says it began in 1914 with *Weeks* of the Federal level, and began in 1961 with *Mapp* on the State level. The first case in the Supreme Court, however, to discuss the suppression rule is, in fact, *Adams v. New York* in 1904, in which a Supreme Court held alternatively that there was no suppression rule associated with the fourth or fifth amendment.

Obviously, we have been living under a regime of suppression on the Federal level since 1914 and at the State level since 1961.

But that particular body of jurisprudence is, however, Court developed. It is not in the text of the Constitution or the intent of the framers, and, consequently, it is open for development, either to expand it or to contract it.

The issue before you, as indeed it would be before the court itself, is whether the experience since 1914 or since 1961 has been happy; whether the reasons offered to justify the rule at that time or subsequently can withstand critical analysis now.

I do not think that the Constitution is frozen in a mode of 1914 or a mode of 1961.

If we could grow in our understanding of racial discrimination and move from *Ferguson* to *Brown v. The Board*, I see no reason why we could not have a similar growth in our understanding of the civil liberties.

As I understand it, the reasons—and that is what I would like now to address myself to—that support the suppression rule, are essentially two. The first rests the rule on an imperative of judicial integrity.

I find that unpersuasive.

Indeed, I find that the rationale of judicial integrity begs the central question before the Court. I do not think that a Court approves of a policeman's conduct by accepting his evidence any more than I think that the Court approves of the defendant's conduct by releasing him. I cannot, therefore, associate myself with the Supreme Court statement as quoted by my colleague that somehow an approval is given to either the defendant or to the policeman by the acceptance or the rejection of evidence. That seems to me to beg the question.

Moreover, if I look carefully at the actual administration of the suppression rule over the years, it is hardly consistent with an imperative of judicial integrity.

Initially, I would draw this committee's attention to worldwide legal systems.

Are we really suggesting that we have integrity, but England, Canada, Australia, our other common law sisters, jurisdictions, do not have integrity?

Or that the German, the Italian, the French, indeed most worldwide systems, do not, in fact, love integrity.

Are we suggesting that their judicial systems lack integrity?

I find that arrogant and hardly admissible.

To the degree that we do not know what goes on worldwide, I find it narrow minded.

In addition, if we examine the administration of the rule in this country, I cannot find, for example, that the rule of what I grew up learning as standing—and which I suppose Mr. Justice Rehnquist in *Rakas* and *Salvucci* would suggest is part of the fourth amendment itself—is consistent with an imperative of judicial integrity.

Nor can I find that the attenuation rule, the retroactivity rule, the use of perjury for cross-examination, or the habeas corpus rules—all currently in operation, many of which go back to the beginning of the rule itself—consistent with a rationale of integrity.

I find that rationale to be hollow, and I think this committee ought to reject it as a consideration in framing any new legislation.

Let me turn my attention, therefore, to the question of deterrence.

To place this in context, Mr. Chairman, let me make an observation on the irony of the alinement of the forces who present themselves to you today.

There is an analogy—and I think it is indeed a close one ideologically—to the position of some on deterrence of the police and the position of some on deterrence by capital punishment.

Many of those who discuss the issue of capital punishment have suggested for years that capital punishment does not deter. Conversely, many of those same people now suggest to you that the suppression rule does deter the police.

Conversely, many of those people who suggest to you that capital punishment does deter, now suggest in the same voice the suppression rule does not deter the police.

The positions taken here are, I suggest, far more reflective of a preconceived ideological position about capital punishment or the suppression rule than they are about the empirical fact of whether deterrence works either in the use of capital punishment or in the suppression sanction.

In addition I would suggest to you that those who discuss this issue as if it were solely an empirical one, so that the only kind of knowledge we can have in this area has to be based on field surveys, do you a disservice.

There are very few issues in the administration of criminal justice that can be resolved one way or the other on the basis of empirical data. We will have to act here, as in so many other areas, on the basis of clinical experience, that is, the day-to-day experience of those who have actually been involved in the process.

To the degree that I have been involved in that process for 20 years, I will tell you unequivocally that the suppression rule, in fact, deters. Let me repeat that. I will tell you unequivocally that the suppression rule deters.

As a prosecutor in the Department of Justice in designing and executing a variety of raids involving a variety of issues under the fourth amendment, the fifth amendment, and the sixth amendment, I was deterred by what the rules were.

We made an effort to ascertain them and to live up to them the best we could.

In the some 20 years that I have been actively involved in the criminal justice system since, in working with prosecutors, and working with police officers, I will tell you that, in fact, they do

learn the rules and they do their best in most cases to live up to them. The fact is that the rule does deter.

Anyone who suggests to you to the contrary, in my judgment, doesn't know what he is talking about.

But that is not the issue. The issue here is, as it indeed is, in capital punishment, as follows:

Does the marginal degree of additional deterrence gained by the suppression rule over that degree of deterrence already present by the enforcement of criminal and civil sanctions for the violation of constitutional rights outweigh its harmful affects?

The issue, therefore, is not simply deterrence. It is whether the degree of deterrence—additional, marginal, extra deterrence—gained by the exclusion of the evidence, outweighs its cost?

There is indeed considerable deterrence at work in existing criminal law and considerable deterrence at work in the existing civil remedies. Those who would support the suppression rule based on deterrence have to show, or at least argue persuasively, that the marginal deterrence gained by the rule is worth the cost.

Let me identify for you—I suppose to balance what my colleague has said to the committee—what some of those costs are that we are now paying without real return. I do not think I can articulate the rationale for the rule itself much better than he has. Since he had not discussed with you the costs, our joint presentations will be more balanced if I do and limit myself, in the interest of time, to costs.

I think that the first and single and most important cost of the suppression rule is the moral confusion it introduces into the criminal justice process itself.

For example, this body has recently had to face the very, very difficult issue of whether Senator Williams' conduct was inconsistent with ethical standards that a U.S. Senator ought to follow. That was a terribly important ethical issue for this body to wrestle with. But I think it was unfortunate that that issue was confused by the question of the propriety of the FBI's conduct in Abscam. I think that the issue of the propriety of the FBI's conduct in Abscam is a terribly important issue, too. I would hope that the U.S. Senate conducts an investigation of Abscam and worries about the propriety of that sort of law enforcement conduct. But I think it is a mistake to discuss both issues at the same time in the same place because it leads to people confusing one with the other.

I can tell you, as one who has made an effort to teach young law students, that it is a most difficult thing to get them to focus on what is relevant, to exclude irrelevancies, and to focus on the real issues. When we mix unrelated matters in the criminal process, we undermine the moral force of the criminal law, both as it deals with criminal behavior by defendants and as it deals with unlawful behavior by the police, and that confusion is the largest single cost that we pay.

Second, I think that the administration of the rule results in a diversion of limited resources. Not every case would be litigated to vindicate, say, the fourth amendment, but for the fact that there is a hope that we can somehow suppress evidence. Extravagant claims are pressed on the courts. Enormous amounts of time are being expended in worrying about details in the administration of

justice that I think ought not be being litigated and would not be litigated if they had to stand on their own merits.

Third, I think it is realistic to say that as a practical consequence, the existence of the suppression rule leads to disrespect for the law on the part of the law enforcing agencies themselves.

I am not saying this is a good thing or a bad thing. I am describing it as an empirical fact.

I think it leads to the phrase that is common among some police officers that, "A little perjury goes a long way in a good cause." They learn to distinguish between perjury on a motion to suppress and perjury on the question of guilt or innocence at the trial. I would suggest to you, with an old fashioned sense of morality, that there is no difference between perjury in one situation and another. What happens over time is that if you corrupt or set up a system that leads to the corruption of law enforcement officers, they learn to lie as a means to gain an end, well, they will begin lying about issues dealing with the Constitution, but they will end up by lying about the issues of innocence, and I think that is not a good consequence to flow from it.

Fourth, I was chief counsel here in 1970 when this committee wrestled with the very difficult question of when to utilize immunity techniques in the enforcement of the law, that is, to displace an individual's privilege against self-incrimination in order that we can gather evidence to convict. That is a very difficult issue.

Ultimately this committee decided that it ought not be done except by the Attorney General of the United States, and then only based on a court order. That it ought to be, in fact, a carefully weighed decision.

The practical consequences of the suppression rule, however, is that it entrusts to every police officer, at the lowest possible level in the administration of justice, the power to grant immunity to criminals.

Functionally, there is no difference between the immunity granted by a court on an order secured by the Attorney General and an unconstitutional search and seizure. They both can give you, in effect, use immunity.

I think that kind of power ought not be lightly given to the police.

But let me give to you what I think is one of the most important and often forgotten objections to the suppression rule, and it goes like this: The suppression rule is inconsistent with the sense of justice. It ultimately undermines our system of jurisprudence. Just as it is wrong to convict an innocent man, knowing that he is innocent, I suggest to you that it is wrong to release a man who is guilty, when you know he is guilty.

It is a violation of the community's sense of justice.

That fact is also something that we must consider.

Mr. Chairman, that brings me to the question whether I think you are free to take any action at all.

On balance, I think you are free. I think you are free constitutionally to abolish the rule, and I think you are free constitutionally to modify it under a good-faith standard.

My colleague has suggested to you that, he reads at least four to five members of the Supreme Court to have expressed an agreement with the good-faith rule I argue.

I think, to the degree that the Constitution is what the Court says it is, it is therefore, likely that the Court itself will, in the next year or so, adopt the good-faith rule and begin working out its implementation.

I would think that the Chief Justice, Justices Rehnquist, Powell, White, and O'Connor, will very likely vote to adopt the good-faith rule, and I think it is highly likely that Mr. Justice Blackmun will as well.

Similarly, I think that you could persuade the Court to abolish the suppression rule itself if you held a carefully framed set of hearings and made a carefully framed set of findings and you spent as much time worrying about the perfection of an alternative civil remedy as you have worrying about the perfection of the suppression sanction itself. I think that you could, therefore, abolish it.

On balance, I think that if we are going to take any action at all here, as opposed to leaving the Court to work it out itself, I would prefer abolition to a modification based on the good-faith test.

Nevertheless, I recognize that this is a body that not only does what law professors think is wise, but moves incrementally to do what is prudent.

Let me suggest to you, therefore, some things that you ought to consider in looking at these various bills.

Let me begin by coming back to what I think is the crucial question, should the rule reflect objective or subjective good faith. But first a couple of other remedies.

I think in looking at alternative civil remedies, you must make it explicit that they include injunctive relief and declaratory relief. I find it unnecessarily limited that these bills talk only of civil damage relief. It is far better when there is a conflict in the community between law enforcement and the people being subjected to unconstitutional searches and seizures that the conflict not be resolved after the fact in damage suits. It ought to be done beforehand through injunctive and declaratory relief.

Let me say also that I think you should put a provision in here for liquidated damages. In many situations, you are not going to be able to find actual damages and, consequently, a remedy that promises actual damages is not going to promise much at all. You should put in the bill a provision for liquidated damages, as indeed we did in 1968 in the wiretap statute.

You have provisions in these bills saying what I assume to be true anyway; to wit, that Federal law enforcement officers are subject to administrative sanctions. I would hope, however, that if you have a provision in the bill dealing with this that you also introduce some sort of reporting system.

I would like to find out how administrative sanctions work.

You will recall that in title III of the 1968 act we put in a detailed reporting system on the use of electronic surveillance: how many were put in, where they were put in, how long they were left in, who was listened to.

I see no reason why a similar reporting system could not be developed in terms of complaints, the nature of the complaints, the

investigations conducted of the complaints, the adjudication of the complaints, and the sanctions, if any, and of what character, were imposed on the officers.

If the Department of Justice comes to you and suggests that administrative remedies are adequate, I think it should be willing to carry the burden of proving on a continuous basis to the Judiciary Committees in the House and the Senate that they are in good faith setting up and applying administrative remedies.

Let me turn now to what is the last question. That is, the argument between both good faith understood subjectively or objectively.

Mr. Chairman, as one who has litigated cases for a number of years, and has made an effort to teach the difference between negligence and recklessness in the criminal law generally, I would suggest to you that that distinction is probably more theoretical than real. As a practical matter, when it comes down to finding out what a police officer thought subjectively, there is no reason why we have to believe what he says. The chances are that our test as to whether we believe him or not—that is his subjectivity—will be some comparison between what we understand to be objective good faith and what this individual did and now says. I think that in the process of administration the two ideas will tend to merge.

Nevertheless, I would suggest to you that the test ought to be one of objective good faith. In other words, negligence.

I would not associate myself, however, with Professor La Fave's suggestion to you that somehow purely subjective good faith would undermine the fourth amendment. I would think that subjective good faith would get into the question of the training of the officers. And if, in fact, the officers were not trained, it would seem to me to be extremely difficult to find them to be in subjective good faith.

Nevertheless, I would suggest to you that what should be adopted, if you go the route of a modification, would be an objective good faith standard.

Thank you.

Senator MATHIAS. Thank you, Professor Blakey.

Let me—if I can sort of say it without disrespect—do a sort of clearing out of the underbrush.

First of all, I agree completely with you that there should be no confusion between the charges brought by the Ethics Committee against Senator Harrison Williams and the conduct of the FBI or other law enforcement agencies that resulted in those charges. And I am glad that the Senate resisted the temptation to confuse it. There was some discussion of both aspects during the Williams debate. But the Senate rather firmly rejected the intermingling of those subjects.

Professor BLAKEY. Which might be a good precedent for abolishing the suppression rule.

Senator MATHIAS. Well, I want to report to you that even as we have talked here today, the Senate adopted a resolution which created an investigating committee to pursue the Abscam and similar activities.

Second, having agreed with you on that, I am going to disagree with you on the subject of arrogance. I do not think it is necessar-

ily arrogant on the part of the United States or on the part of American citizens, to assert the policies that we have developed over the years.

I am reminded of a story that an Englishman once told me about Lord Cramburn and his wife who went to a parish church just after he had been elected to the House of Commons. As they left the church a wonderful Tory lady rushed up to him and congratulated him on his election and said it was so great that he was going to be representing that constituency. But, she said, "I worked in the Tory Party for years, ever since days of the Primrose League, and I have observed that people sometimes think that you and Lady Cramburn act a little aloof, a little superior." Lady Cramburn perked up and said: "Oh, no, my dear. Not superior, just different."

So, maybe we are not superior, but just different.

CONGRESSIONAL AUTHORITY

But let me ask you both to address one of the fundamental questions before the subcommittee, which is the scope of congressional authority to modify or abolish the exclusionary rule. And I would appreciate it if each of you would give us your thoughts and in so doing react to these arguments that have been made in the subcommittee:

One, that the exclusionary rule is a judge-made rule of evidence that Congress can negate; that Congress has already taken an action to offset a criminal procedure decision by the Supreme Court, when in 1968 we enacted a provision that was designed to offset the *Miranda v. Arizona* decision.

Second, that the argument that the exclusionary rule was an exercise of the Supreme Court's supervisory power over the lower Federal courts lost its force after *Mapp v. Ohio*, which applied the rule to the States. The Supreme Court's supervisory power does not extend to the States. Thus, as Justice Clark wrote in *Mapp*, the rule is a clear, specific and constitutionally required, even if judicially implied, deterrent safeguard without which the fourth amendment would be reduced to a form of words.

And, finally, we have had it argued before us that Congress at least has the constitutional power to adopt a good-faith exception to the rule and three points are made to support this argument: That the sole or primary basis for the rule is deterrence; that it is not possible to deter actions taken in the good-faith belief that they were constitutional; and that, therefore, Congress can limit the rule to those circumstances where the deterrence rationale applies, which is in nongood faith violations.

Professor La Fave, do you want to take the first run at that?

Professor LA FAVE. Let me try those one at a time, Mr. Chairman.

On point No. 1, which as I understand it is the argument that the exclusionary rule is judge made and for that reason subject to change or abolition by the Congress, I would respond to that by simply observing that most fourth amendment law, even apart from the exclusionary rule, is judge made as well. The Constitution, whether you look at the fourth amendment or any other part

of the Bill of Rights, tells us very little. The Supreme Court has had to flesh out the details over the years.

So, to say that something is judge made, I think advances the ball not at all. The question is: What were the judges doing when they made whatever it is they made, whether it is the exclusionary rule or the definition of probable cause? If they were stating constitutional doctrine, then despite the fact that it was judge made, it is at that point a constitutional principle not subject to change by the Congress.

Indeed, I am delighted that you mentioned the past efforts by the Congress to deal with constitutional exclusionary rules, which include the one you mentioned, a statutory provision which in effect says that the *Miranda* exclusionary rule has been abolished by the Congress, another which in effect says that the Wade-Gilbert rule on eye witness identification has been abolished by the Congress.

To the best of my knowledge, no court has ever seriously entertained the thought that either one of those statutes is constitutional or has any effect. So, I think that the experience under those statutes tells us something.

As to point No. 2, Mr. Chairman, which is that while at one time it might be said that the exclusionary rule was based on supervisory power, this cannot be so after *Mapp*, all I can do is voice my agreement. *Mapp* applied the exclusionary rule to the States, and that can hardly be explained as an exercise of supervisory power.

As for your third question, it is the toughest question of all. I think reasonable people certainly could differ on that question, which again is: Assuming that it is not within the power of Congress to totally abolish the exclusionary rule, is there anything that can be done?

Perhaps the answer is yes.

As I recall, the first subissue you stated under that third heading was whether deterrence is the principal basis of the rule, so that any surgery on the rule which is tied in with the deterrence function or takes into account the deterrence function would be reasonable.

You will find a difference of opinion among scholars on that point. Some people take very seriously the imperative of judicial integrity, the notion that the Government should not profit from its own wrongdoing, and so forth. But it must be acknowledged that in recent years the Supreme Court has tended to rely primarily on the deterrence objective.

Now, the hard question, it seems to me, is: Where do you go from there?

I would concede, just for purposes of argument, that limitations on the exclusionary rule which do not significantly withdraw the deterrent effect of the rule might be permissible. But this leads me back to the point which I made earlier in my statement: The good-faith test would not have that effect. I believe that the effect of the good-faith test in practice would be to bring about more undetectable fourth amendment violations than we have had in the past. And, therefore, it would not be a limitation which is consistent with the deterrent objective.

Professor BLAKEY. Mr. Chairman, let me answer each of your three questions in order.

As I understand the first, the exclusionary rule is a judge-made rule, as indeed most of the constitution that we have today is a judge-made constitution. But to that same degree it is a changing, growing, and developing constitution. And, consequently, I do not think it is frozen at any one particular point in time. The suppression rule is, therefore, no better than the reasons that support it.

That is not necessarily true of the text of the Constitution. You must live with the text, but you are not necessarily stuck with the jurisprudence.

On the question of whether the suppression rule today is a supervisory power, I quite agree under *Mapp* the Supreme Court was without constitutional power to impose a supervisory rule on the States. If they had it, they had it only under the 14th amendment.

On the other hand, just as I think police officers can and do often violate the Constitution, I would suggest to you that the rules that apply to the policemen—that is, the rules in the Constitution—also apply to the courts. I can think of a court exercising power beyond what the Constitution accorded it and making unconstitutional decisions. Not in a sense in which the decision is actually unconstitutional, but certainly in the sense in which the court violated its own rules in promulgating that particular rule.

Mapp v. Ohio falls within that category.

The best that you can say on that record is that the ACLU had a single line in its brief to the effect that *Wolf v. Colorado* ought to be overruled. But when a Justice of the Supreme Court leaned forward and asked the lawyer representing *Mapp*, did he think that *Wolf v. Colorado* ought to be set aside, the counsel indicated he was not familiar with the precedent.

Mapp is not an example of a case that was well argued. It is also not a case that treated prior cases with due regard.

Adams v. New York is a footnote in *Mapp v. Ohio*.

It was not frontally faced and fully reconsidered.

And to the degree that *Mapp v. Ohio* rested on a constitutional basis, particularly the *Boyd* case, subsequent Supreme Court cases have so undercut the original *Boyd* decision that I think it can no longer stand as an intellectual underpinning for *Mapp v. Ohio*. *Mapp* is hardly, in short, a firm foundation on which to rest anything.

That brings me really to the next to last point.

It seems to me that the duty to care for the Constitution is not simply in the courts, but also in this Congress and in the Executive. What we engage in in Government is a continuing dialog over what the Constitution means and how its values ought to be implemented in a free society. You ought not act mechanically. Passing a bill that is inconsistent with existing Supreme Court cases, should not, therefore, always be thought to be unconstitutional. I look at this kind of legislation as if it were a petition for rehearing. I think if you have a view of the Constitution that you hold dearly, if you inform yourself, as you are in this hearing, if you make appropriate findings through the investigative processes you have, and if you take that legislation to the Court, having thoughtfully considered it, having weighed the values yourself, the Court will finally tell you whether it is constitutional. You ought not be reluctant to pass a bill which you believe to be constitutional because a

scholar can, by citing cases, suggest to you that there is a good argument why it is unconstitutional. I think you are free to exercise your own good-faith judgment and go forward.

On the question of—

Senator MATHIAS. Let me just interrupt you to say that I not only think we are free, but I think we have a duty to make constitutional decisions.

Professor BLAKEY. Absolutely.

Senator MATHIAS. And it is a form of laziness, if not cowardice, on the part of Members of Congress who say:

Well, we are just going to defer the constitutional question to the courts. We will go on and pass this bill and leave the constitutional question for somebody else to decide.

That is, I think, an abdication of a very serious duty that we have.

Professor BLAKEY. The crucial question is that if you decide that it is constitutional to do it, and there are good and sufficient reasons, and you make the appropriate findings, and you send it over to the Supreme Court, and the Supreme Court says, well, we disagree,—I mean we disagree today in light of this bill—then it seems to me at that stage you have to go back to ground 1 and suggest that at least until you can change the personnel of the Supreme Court, it is unconstitutional.

Constitutional law is a dialog that is a continuing process. It is not simply settled by old jurisprudence or passing individual Justice's opinions by law professors, myself included. And I think it would be a mistake if you handle it on that basis.

Take question of deterrence and the suppression rule. Even if we accept that as its rationale, would a good-faith exception be consistent with it?

I think that is not a question of black and white. I think it is a question of more or less. The Court itself has clearly examined over the years the issue of the contour of the rule by examining the marginal deterrence gained or lost by how that contour changes.

This is true in expanding and contracting various aspects of the rule: expanding or contracting the scope of attenuation, expanding or contracting the right to cross-examine based on previous inconsistent testimony, expanding or contracting questions of habeas corpus. And I think that the peculiar theory of deterrence that you adopt—special, general, or systemic—and the question of more or less that is associated with each—is a question in which you ought to weigh the competing values, listen to the arguments on both sides, and make up your own mind.

Senator MATHIAS. I thank you both very much.

Before we move on to the second panel, let me ask Senator Specter if he has any words for the first panel?

Senator SPECTER. Considering the extensive background I have for questioning, no.

[The prepared statement of Professor La Fave follows:]

PREPARED STATEMENT OF WAYNE R. LA FAVE

Summary of Statement

I) With respect to S. 101 and S. 751, I endorse the constitutional and policy objections to those bills raised in prior testimony by Assistant Attorney General Sachs of Maryland and Professor Greenhalgh for the American Bar Association.

II) With respect to the proposal for a legislated "good faith" exception to the Fourth Amendment exclusionary rule, proposed by Assistant Attorney General Jensen and others, I believe that such an exception is unnecessary, unsound, and in all likelihood unconstitutional.

A) Though a "good faith" exception makes sense where it now exists, in the law concerning when a person who has suffered a Fourth Amendment violation may recover from the offending officer, in an exclusionary rule context such an exception cannot be squared with the Supreme Court's view of the deterrence function of the exclusionary rule (as stated in Stone v. Powell, that of "removing the incentive" to disregard the Fourth Amendment so that "the frequency of future violations will decrease") if viewed as only calling for a determination of whether that particular officer acted in good faith and made a reasonable mistake. Such an approach would put a premium on ignorance, and consequently the only kind of good faith exception even arguably sound or constitutional is one which also takes into account the sufficiency of the training and supervision by the agency employing the officer.

B) Many of the errors which would fall into that category are already dealt with properly under existing Fourth Amendment law.

- 1) Reasonable mistakes of fact are already accepted under the probable cause concept and the various rules on whether a warrant or even probable cause are required.
- 2) Reasonable mistakes of law attributable to a substantive statute later held unconstitutional are already accepted under Michigan v. DeFillippo.
- 3) Reasonable mistakes of law attributable to a statute which overstates the Fourth Amendment authority of the police are not accepted, as the Supreme Court has repeatedly held, and this is a proper result because systemic violations of the Fourth Amendment must also be deterred.
- 4) Reasonable mistakes of law attributable to a subsequent judicial decision creating a new rule are already accepted under United States v. Peltier.
- 5) Thus, the only situation which might even arguably support a "good faith" exception is where an adequately trained and supervised officer errs in applying a valid and pre-existing legal principle to a particular set of facts.

C) Application of a "good faith" example even in such limited circumstances would likely produce adverse consequences:

- 1) It would halt judicial development of Fourth Amendment rights, as courts would have no occasion to reach the merits of a Fourth Amendment claim unless there was already a clear precedent declaring the conduct unconstitutional.
- 2) It would impose on suppression judges the intolerable burden of making exceedingly difficult decisions about what various officers were thinking at some prior time and about what mistakes of law are reasonable.
- 3) It would, because of the amorphous standard involving exceedingly complex and largely unresolvable issues, likely result in a distinct anti-Fourth Amendment bias in suppression rulings.
- 4) Admission of illegally seized evidence under a "good faith" exception would be perceived by police as a license to engage in the same conduct in the future.

Mr. Chairman, I am pleased to have this opportunity to appear here today to present my views on certain proposals to abolish or limit the Fourth Amendment exclusionary rule. I would preface my remarks by noting that my interest in the subject matter presently before this Committee is more than casual or passing. My time in academe corresponds to our years of experience under Mapp v. Ohio,¹ a coincidence which may account for the fact that I have devoted most of my professional life to a study of Fourth Amendment issues. This includes the more traditional legal research into appellate opinions, which has culminated in the publication of a multi-volume treatise on the Fourth Amendment and annual supplements (and which has imposed upon me for some years the regime of reading virtually every published appellate decision on the Fourth Amendment), and also includes empirical research into the activities of police in making arrests, searches and seizures, and the preparation of training materials regarding those activities for use by police officers and police departments. In short, over the years I have had occasion to think about Fourth Amendment issues on both the theoretical and practical level, in terms of their significance not only for lawyers and judges but also for the law enforcement officers who are charged with the responsibility of abiding by the Amendment. The comments which follow are grounded in those experiences.

Your counsel, Mr. Klipper, has kindly provided me with copies of testimony received by this Committee on October 5 and November 12. Insofar as is possible, I shall try not to repeat the points which have already been made to the Committee by other witnesses. As for S. 101 and S. 751, I would simply note that I endorse completely and enthusiastically the constitutional and policy objections to those bills raised by Attorney General Sachs of Maryland and by Professor Greenhalgh on behalf of the American Bar Association. For the next few minutes, therefore, I would like to address another proposal which has been put before your Committee by Assistant Attorney General Jensen and some other witnesses, namely, that Congress should enact a statute to the effect that the Fourth Amendment exclusionary rule shall not apply to evidence obtained by an officer in the reasonable and good faith belief that his conduct was lawful. This proposal, as you know, represents the policy of the Reagan administration, was put forward last August by the Attorney General's Task Force on Violent Crime,² and was adopted by the Fifth Circuit in 1980 in the now-famous case of United States v. Williams.³ Upon superficial examination,

NOTE.—Footnotes appear at end of statement.

this good faith exception seems simple, straightforward and especially appealing; after all, if the policeman thought he was doing the right thing, what is to be gained by suppressing relevant evidence? I would suggest to you, however, that a closer examination of this proposal makes it unmistakably clear that such a legislated exception to the Fourth Amendment exclusionary rule is unnecessary, unsound, and in all likelihood unconstitutional. Its rationale is faulty and, unless we are truly convinced that the Fourth Amendment itself should be stricken from the Constitution, its impact would be devastating.

By way of explaining why I feel this way, it may be useful to begin with the question of exactly what state of mind of a police officer would justify giving his conduct the appellation "good faith." Of the possibilities, ranging from the mere absence of a subjective evil intention to commit a Fourth Amendment violation to the presence of a reasonable belief that the conduct in question is lawful, most supporters of a "good faith" exception claim allegiance to the more cautious and limited reasonable man standard. Thus, the Attorney General's Task Force would require a "reasonable, good faith belief" of constitutionality;⁴ and the Williams rule extends only to actions "taken in good faith and in the reasonable, though mistaken, belief that they are authorized."⁵ It is a matter of concern, however, that the rationalization offered for such surgery upon the exclusionary rule outruns these statements substantially. In the Williams case, for example,⁶ the new rule is first stated with a reasonableness limitation, but this is immediately followed by the assertions that "the exclusionary rule exists to deter willful or flagrant actions by the police"⁷ and that "where the reason for the rule ceases, its application must cease also,"⁸ and then for emphasis it is later proclaimed that a "police officer will not be deterred from an illegal search if he does not know that it is illegal."⁹ It is little wonder that the ten judges in Williams opposed to such tinkering with the exclusionary rule were moved to respond: "If this is correct, it appears needless to require the police officer's subjective good faith also be objectively reasonable. A policeman who is in complete subjective good faith is unlikely to stop to ask himself, 'Am I also reasonable?'"¹⁰

This is a very logical conclusion if one begins with the Williams and Justice Department view of the exclusionary rule's deterrence rationale. But that is a wrong conclusion precisely because it is grounded in a cockeyed

view of what the deterrence rationale is all about. Such a modification of the rule "would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent."¹¹ To put the matter somewhat differently, if at a suppression hearing it is shown the arresting or searching police officer acted illegally because of an insufficient understanding of the Fourth Amendment's limits on his power, this is hardly a case for withdrawing the exclusionary sanction on the ground that the policeman was not in a condition to be deterred in this case. Rather, it is an especially compelling case for applying the exclusionary rule so as to encourage the taking of such additional steps as will enhance police understanding of these limits. And this is true, I should add, even if we are prepared to say that from the limited perspective of the particular officer in the particular case the arrest or search was an understandable or "reasonable" action to take.

The full import of this last remark can best be seen by considering a related body of law, that concerning so-called "constitutional tort" actions undertaken against police by those claiming to be the victims of illegal seizures and searches. In Pierson v. Ray,¹² the Supreme Court concluded that if a jury "found that the officers reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional."¹³ As for what constitutes "good faith" in this tort context, decisions are to be found indicating that an officer may quite properly be held to have acted in "good faith" when his misunderstanding of his Fourth Amendment authority was attributable to misinformation conveyed to him by his department.¹⁴ And it would seem to follow from this that a department's failure to communicate relevant information to an officer concerning the legal restraints on his power also has an important bearing on whether that officer "reasonably should have known" that his conduct was illegal.¹⁵ Such an approach to the question of the officer's personal liability strikes me as most sensible.

Now, what exactly does this have to do with the issue of whether a "good faith" limitation should be appended to the exclusionary rule? Absolutely everything; proponents of that limitation contend; they find a perfect analogy

between existing law in these "constitutional tort" cases and what they believe the law ought to be in the exclusionary rule context. Thus, Justice White concludes his dissent in Stone v. Powell¹⁶ with this assertion: "If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf."¹⁷ Similarly, another commentator reasons that the analogy is sound because of a common purpose of the tort remedy and exclusionary rule: "Both seek to isolate those aspects of the officer's conduct that may justifiably inculpate the officer and reasonably subject him to civil or exclusionary sanctions."¹⁸ But comments such as these reflect a profound misunderstanding of what the exclusionary rule's deterrence function is all about.

The tort action, the Supreme Court recently stressed,¹⁹ is "intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." But in an action involving search victim Jones, the plaintiff, versus policeman Smith, the defendant, how far we believe it is fair to go in the service of these two objectives is governed by some rather traditional tort notions about the relative positions of the parties to a negligence lawsuit. If the defendant has performed reasonably, we leave the cost of the harm on the plaintiff, where the fates placed it, instead of requiring the defendant to assume it; similarly, we are not prepared to make the reasonable defendant respond personally in damages merely in the interest of deterring others.

Consider now the criminal case in which the exclusionary rule issue arises. It is not a case styled policeman Smith versus search victim (and now defendant) Jones; rather, it is the United States or the State versus Jones. No longer does it make sense to say that the policeman's "good faith," not unlikely attributable to erroneous or inadequate training by his department, must control so that the officer is not unfairly "mulcted in damages."²⁰ Contrary to the assertion of the commentator I quoted minutes ago, exclusion is not a sanction to which the officer is personally subjected, but rather is one imposed upon the system. And, contrary to Justice White's assumption, exclusion of evidence is not a benefit conferred upon the defendant "solely on his behalf" to compensate him for the prior wrong done to him,²¹ as might be said of tort damages. The defendant is at best an incidental beneficiary

when exclusion occurs for the purpose, as the Supreme Court stated in Stone v. Powell,²² of "removing the incentive" to disregard the Fourth Amendment so that "the frequency of future violations will decrease."²³

This means that whether the officer who made the challenged arrest or search was sufficiently informed about relevant Fourth Amendment principles so that he could have been deterred is beside the point, for that is not the kind of deterrence we are talking about. "The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them."²⁴

Once it is appreciated that this is the kind of deterrence we are talking about, it becomes apparent that the dimensions of the debate concerning the proposals for a "good faith" exception to the exclusionary rule are changed dramatically. The question no longer is whether, assuming "good faith" by the arresting or searching officer, there is some specific deterrent consequence which is to gained by excluding the illegally obtained evidence. Rather, it is whether in such circumstances there is something to be lost, in the long run, by admitting the evidence acquired in violation of the Fourth Amendment. I think that there is, about which I will say more later. For now, however, it is necessary to concentrate upon a narrower point, and that is this: the argument for application of a "good faith" exception is absolutely untenable in the common situation I described earlier, that in which the officer's violation of the Fourth Amendment in "good faith" is "reasonable" as to him because he has been insufficiently or incorrectly trained. Making the officer respond in damages in such a situation would, as I said, be unconscionable. But even more unconscionable would be a failure in like circumstances to apply the exclusionary rule in a criminal prosecution, for such inaction would communicate an unmistakable message to "the wider audience of law enforcement officials and society at large." Society at large and police supervisors would know that there is really no need to expend either the money or the effort which would be required to ensure that police with arrest and search responsibilities are

adequately trained as to the extent of their powers in that regard.

And thus I submit that if any kind of "good faith" exception to the exclusionary rule were ever created, it would of necessity have to be grounded in a uniquely narrow conception of what constitutes the requisite good faith. As stated by the Fifth Circuit in what appears to be an after-thought appended to the Williams case,²⁵ the necessary belief "must be grounded in an objective reasonableness" and "must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully."²⁶ For until it is established that the officer's Fourth Amendment encroachment occurred notwithstanding his reasonableness and the reasonableness of the government agency for which he is acting, there is not a basis upon which it can be even arguably claimed that application of the exclusionary rule would be inappropriate. To apply the exclusionary rule when an individual officer oversteps his bounds but not when the violation of the Fourth Amendment is caused by systemic defects, directly attributable to "the institution that has been established to protect the very rights it has transgressed,"²⁷ would be to turn the Fourth Amendment on its head.²⁸

Whether creating such a narrow "good faith" exception to the exclusionary rule would be worth the candle is the question which needs to be addressed at this point. It quite naturally prompts two other inquiries: (1) What kinds of errors falling within this exception are not sufficiently dealt with by existing Fourth Amendment doctrine? And (2) What consequences could be anticipated if the exclusionary rule were so narrowed?

One type of error sometimes highlighted by advocates of a "good faith" exception is that which occurs when an officer, acting upon a correct perception of the governing legal principles, makes a mistaken judgment as to the relevant facts because "the historical facts are disputed or are otherwise in doubt."²⁹ But there is no need to tamper with the exclusionary rule to accommodate such situations, for it may generally be said that "the exclusionary rule is already held inapplicable where a policeman makes a reasonable factual mistake."³⁰ This is most apparent as to the Fourth Amendment's probable cause standard, as probable cause exists even when the police have made a reasonable factual error.³¹ Reasonable factual mistakes are also generally tolerated with respect to police decisions on whether a warrant or even probable cause

is required. Illustrative are cases saying that the lawfulness of a warrantless search does not depend on whether it turns out there was an emergency in fact but rather on whether, for example, the police at the time had a "reasonable belief that the contraband is about to be removed";³² and decisions declaring that a search is lawful if "the officers, as reasonable men, could conclude that defendant's consent was given."³³ Moreover, certain other Fourth Amendment doctrines have been recast over the years in such a way that certain hard-to-determine facts are no longer controlling.³⁴

Turning now to mistakes of law, it is not difficult to imagine situations in which such a "good faith" mistake is "reasonable" in the sense that we would not be inclined to criticize the individual officer, the police department or even the criminal justice system at large for the error. Consider, for example, a case where an officer made an arrest for violation of a substantive statute thereafter found unconstitutional. Surely, it might well be argued, it makes no sense to exclude evidence obtained incident to that arrest, for admission of the evidence is hardly an inducement to future wrongdoing. But those of such a mind need seek no change in the exclusionary rule, for the Supreme Court has already accommodated that case on another basis. In the 1979 case of Michigan v. DeFillippo,³⁵ the Court held that such an arrest is lawful simply because it falls within the traditional definition of probable cause.³⁶

Consider now a variation on DeFillippo, namely, a case in which an officer makes a seizure or search pursuant to a statute later held unconstitutional under the Fourth Amendment because it defines the authority of the police to so act too broadly. Here again the police officer has acted in good faith, and once again there has been reasonable reliance upon a "presumptively valid" statute. Thus the result would be nonexclusion of any evidence obtained incident to that arrest or search under the reasoning of those who argue that the exclusionary rule should be inapplicable whenever the officer could not have been deterred. But such a hemianoptic view of the deterrence function is no more appropriate here than it was in the circumstances discussed earlier. Here again, the dispute is not between the arresting officer and the defendant, but rather between the defendant and the government, which is "responsible for the actions of its legislative bodies as well as for the actions of

its police."³⁷ Failure to apply the exclusionary rule when the legislature violates the Fourth Amendment would be most inappropriate, as the Supreme Court has consistently recognized both before and after DeFilippo.³⁸ for such an omission would create an incentive for future systemic inroads upon the Fourth Amendment.

That situation must in turn be distinguished from yet another, where the arresting or searching officer fully complied with extant Fourth Amendment requirements, but a subsequent judicial decision would make the officer's conduct unconstitutional in some respect. Though again one might doubt that anything would be achieved by exclusion, the problem has already been addressed by the law on retroactivity; the Supreme Court has consistently held that new Fourth Amendment rules operate prospectively only.³⁹ Illustrative is United States v. Peltier,⁴⁰ where the Court noted that this result intrudes not the slightest on the exclusionary rule's purpose "to deter unlawful police conduct."⁴¹

Thus, there is only a single fact situation which might even arguably support a "good faith" exception, and that is where an adequately trained and properly motivated law enforcement officer errs in applying a valid and pre-existing legal principle to a particular set of facts. Just what should be done in such a situation is understandably a question on which the debate is most intense. In favor of applying a "good faith" exception, it may be argued that the entire criminal justice system has functioned reasonably and that consequently exclusion would not aid deterrence of any variety. But I am persuaded by the contrary line of reasoning, which is grounded in the likely consequences of admitting the evidence. Because the exclusionary rule "was designed to discourage officials from invariably opting for the choice that compromises Fourth Amendment rights,"⁴² it should not be withdrawn from those cases in which police are confronted with the admittedly difficult task of deciding what interpretation to give an ambiguous statutory or court-drawn rule of conduct. Application of a "good faith" exception in such circumstances would constitute a "wide-open invitation" to always opt for the broadest possible construction, for such an expansive interpretation would carry with it virtually no risk. In particular, were a "good faith" exception to the exclusionary rule adopted there would likely occur four adverse consequences.

Firstly, I believe that adoption of the "good faith" exception would "stop dead in its tracks judicial development of Fourth Amendment rights."⁴⁵ This is because "if evidence is to be admitted in criminal trials in the absence of clear precedent declaring the search in question unconstitutional, the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts."⁴⁶ Some of the "good faith" advocates deny this. They say that their proposal "would preserve judicial review of Fourth Amendment questions"⁴⁷ because "only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at the time he acted knew or should have known that his conduct was impermissible."⁴⁸ But I doubt that this is how it would turn out, for "there is clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any event the evidence [is] admissible in the particular case at bar."⁴⁹ And I find it unlikely that supporters of the "good faith" exception really would have it any other way, as some of them are forthright enough to admit.⁵⁰

Secondly, I believe that adoption of the "good faith" exception would impose upon suppression judges the heavy burden -- indeed, the intolerable burden -- of making exceedingly difficult decisions on a regular basis. For one thing, because the "good faith" test has an important subjective element, it would be necessary for the suppression judge in each case to "probe the subjective knowledge"⁵¹ of the officer who made the challenged arrest or search. But this subjective inquiry could hardly stop there, for a conception of "good faith" which is even arguably consistent with the exclusionary rule's deterrence function must be focused more broadly than the individual officer, and thus it would be wrong to say that "only the knowledge, real or constructive, of the official conducting the search is relevant."⁵² Rather, in a given case the court would likely have to determine the "subjective states of mind of numerous people."⁵³ Not only would this be unduly burdensome, but it would intrude into the suppression process a factual issue on which evidence will be "difficult to come by apart from the officer's self-serving and generally uncontradicted testimony."⁵⁴

What experience we have had with inquiry into subjective states of mind in the exclusionary rule setting convincingly shows that the less

frequently such inquiries are necessary the better off we will be. I refer to the experience under that line of authority permitting an otherwise valid arrest or search to be drawn into question by a showing of the officer's bad faith, which has certainly proved that "the catch is not worth the trouble of the hunt."⁵⁵ And thus it is especially true here, to use the language from a Supreme Court decision of some years ago, that "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."⁵⁶

Some proponents of the "good faith" exception have attempted to blunt such arguments by noting that their test also contains an objective "reasonableness" component, which they somehow assume will usually or always make unnecessary the subjective determination.⁵⁷ But this provides little solace once it is understood what is encompassed within the objective determination. As we have seen, the question is what kind of error regarding the law of search and seizure would be made by a reasonable officer who had been reasonably trained in that law. But it is extremely "hard to determine what constitutes a reasonable mistake of law,"⁵⁸ requiring as it does "objective extrapolations of existing law"⁵⁹ and inquiry into "the inferences from existing law" that various persons "should have drawn."⁶⁰ Nor will it do to say that the Supreme Court has relied upon reasonable good faith considerations in DeFillippo and Peltier, dealing, respectively, with the subsequently invalidated statute and the subsequently overruled precedent. Those cases involve "authoritative pronouncements which establish a reasonable basis for"⁶¹ the mistake of law, but no similar benchmark exists for assaying other allegations of good faith.

Thirdly, I believe that adoption of the "good faith" exception would likely result in a distinct anti-Fourth Amendment bias in suppression rulings. This would be a natural consequence of making the suppression decision ride upon an amorphous standard involving exceedingly complex and largely unresolvable issues. As with the open-ended and unstructured concept of reasonableness entertained by the Supreme Court in an earlier day,⁶² "what it means in practice is that appellate courts defer to the trial courts and trial courts defer to the police."⁶³ Reviewing courts could not be expected to set matters straight, for the

elusive "good faith" exception would "add a factor of discretion to the operation of the exclusionary rule impossible for the appellate courts effectively to control."⁶⁴

Fourthly, I believe admission of illegally seized evidence under a "good faith" exception would be perceived or treated by the police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule "is that police officers may feel that they have been unleashed"⁶⁵ and consequently govern their future conduct by what passed the good faith test in court on a particular occasion rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances, and the like. Even Professor Steven Schlesinger, a staunch opponent of the exclusionary rule,⁶⁶ has concluded that the "good faith" proposal "provides little or no deterrence for violations deemed by the courts to be in good faith" because it fosters "a careless attitude toward detail on the part of law enforcement officials" and encourages "police to see what can be gotten away with before the courts draw the line on what is an intentional violation."⁶⁷

The essential point was made by Chief Justice Warren in Terry v. Ohio⁶⁸ where he stated for the Court: "A ruling admitting evidence in a criminal trial. . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."⁶⁹ The notion therefore is not that the police are inherently evil, but rather that because they are "engaged in the often competitive enterprise of ferreting out crime"⁷⁰ they are no less likely than the rest of us to equate admissibility with legality. As the late Dean Monrad Paulsen observed some years ago, if illegally seized evidence is not excluded, "it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place."⁷¹ And thus I find it not at all surprising that a most recent empirical survey of police attitudes has found that "to police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation."⁷²

For these reasons, I believe that a legislated "good faith" exception to the Fourth Amendment exclusionary rule would be most unwise. I also believe that such legislation might well be held unconstitutional, though quite clearly no one can assert unequivocally either that such a

statute is constitutional or that it is not. It cannot be denied that five members of the present Supreme Court, in one context or another, have indicated some sympathy for a "good faith" exception.⁷³ But that hardly settles the matter, for those comments were made without the advantage of Briefs and argument on both sides of the issue. Because the Fourth Amendment exclusionary rule is constitutionally grounded (for, how else could it apply to the states), the only argument which can be made for the constitutionality of a "good faith" exception is that presented to you earlier by Assistant Attorney General Jensen - that an exclusionary rule so limited would be consistent with the dominant function of the rule, deterrence. But the thrust of my remarks here today has been that such an exception in fact conflicts with the deterrence objective as defined by the Court in Stone v. Powell⁷⁴: "removing the incentive" to disregard the Fourth Amendment so that "the frequency of future violations will decrease." And it is for that reason that I have concluded the "good faith" exception is unconstitutional under the Jensen theory.

Footnotes

1. 367 U.S. 643 (1961).
2. Attorney General's Task Force on Violent Crime, Final Report 55 (Aug. 17, 1981), recommending that "evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment."
3. 622 F.2d 830 (3rd Cir. 1980).
4. Attorney General's Task Force on Violent Crime, Final Report 55 (Aug. 17, 1981) (emphasis added).
5. 622 F.2d at 840 (emphasis added).
6. Another example is Justice White's opinion in Stone v. Powell, 428 U.S. 465, 540 (1976), where, after stating a reasonableness requirement, he sets out the broad justification that "when the officer is convinced that he has probable cause to arrest he will very likely make the arrest," which "is precisely what the community expects the police officer to do." Id. at 538-39. Still another is the statement in Note, 20 Ariz.L.Rev. 915, 917-18 (1978), that "one may be deterred from unacceptable behavior only if he perceives the suspect qualities of his conduct."
7. 622 F.2d at 840.
8. Id. at 840.
9. Id. at 842.
10. Id. at 850 (Rubin, J., concurring).
11. Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1044 (1974).

12. 386 U.S. 547 (1967).
13. *Id.* at 557. Though Pierson involved an arrest unlawful only in the sense that it was for a crime defined in a substantive statute later invalidated, this "good faith" defense was extended by lower courts to the more common case of an officer who honestly misjudged the extent of his arrest or search power or its application in the particular case. The leading case is Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973). This extension is consistent with the Supreme Court's more recent teaching as to the tort liability of a government official, namely, that the question is whether "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected". Wood v. Strickland, 420 U.S. 308, 322 (1975).
14. See, e.g., Dominguez v. Beame, 603 F.2d 337 (2d Cir. 1979); Thompson v. Anderson, 447 F.Supp. 584 (D.Md. 1977).
15. Stadium Films, Inc. v. Baillargeon, 542 F.2d 577 (1st Cir. 1976).
16. 428 U.S. 465 (1976).
17. *Id.* at 541-42 (White, J., dissenting).
18. Note, 20 Ariz.L.Rev. 915, 918 (1978).
19. Owen v. City of Independence, 445 U.S. 622, 651 (1980).
20. Pierson v. Ray, 386 U.S. 547, 555 (1967).
21. "The objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward." Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 335.
22. 428 U.S. 465 (1976).
23. *Id.* at 492.
24. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chl. L.Rev. 665, 709-10 (1970).
25. Because set out in a footnote revealingly labeled "4a."
26. United States v. Williams, 622 F.2d 830, 841 (5th Cir. 1980).
27. Owen v. City of Independence, 445 U.S. 622, 651 (1980).
28. "Fourth Amendment violations become more, not less, reprehensible when they are the product of government policy rather than an individual policeman's errors of judgment." United States v. Peltier, 422 U.S. 531, n.18 (1975) (Brennan, J., dissenting).
29. Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).
30. Kaplan, *supra* note 11, at 1044.
31. As the Supreme Court said some years ago in Brinegar v. United States, 338 U.S. 160, 176 (1949): "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."
32. United States v. Rubin, 474 F.2d 262 (3d Cir. 1973). When entry is made for the purpose of dealing with an apparent danger to a person, courts have been particularly inclined to stress the fact that the police may act on reasonable appearances. See, e.g., People v. Mitchell, 39 N.Y.2d 179, 383 N.Y.S.2d 246, 347 N.E.2d 607 (1976).
33. People v. Henderson, 33 Ill.2d 225, 210 N.E.2d 583 (1965). Even more

common are cases saying that police may proceed upon reasonable appearances as to whether the person has authority to permit a search of a certain place. See, e.g., *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975).

34. A prime example concerns the law on when property may be deemed abandoned for Fourth Amendment purposes so as not to be protected by the Amendment. It once required the police to determine correctly another individual's intentions with respect to that property, but under the modern "expectation of privacy" approach it is customary to ask whether that person dealt with the property in a way which could be expected to manifest his privacy interest to others. See, e.g., *City of St. Paul v. Vaughn*, 306 Minn. 337, 237 N.W.2d 365 (1975).
35. 443 U.S. 31 (1979).
36. That definition is: "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. Id. at 37. One aspect of probable cause, then, is whether the defendant's conduct is proscribed by law, which the officer in *DeFillippo* reasonably resolved in the affirmative by reliance upon "a presumptively valid" enactment. Although the Court noted in passing that its result squared with the deterrence function of the exclusionary rule, it is important to stress that the case did not involve any tampering with the exclusionary rule.
37. *Michigan v. DeFillippo*, 443 U.S. 31, 43 (1979) (Brennan, J., dissenting).
38. *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almedia-Sanchez v. United States*, 413 U.S. 266 (1973); *Sibron v. New York*, 392 U.S. 30 (1968); *Berger v. New York*, 388 U.S. 41 (1967).
39. See, e.g., *Williams v. United States*, 402 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969).
40. 422 U.S. 531 (1975).
41. Id. at 542.
42. *United States v. Peltier*, 422 U.S. 531, 559 (1975) (Brennan, J., dissenting).
43. Id. at 559.
44. This is because "if this Court later decides that the officers guessed wrong in a particular case, one conviction will perhaps be lost, but many will have been gained." Id. at 559.
45. *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).
46. Id. at 554.
47. Bernardi, *The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment*, 40 DePaul L.Rev. 51, 101-02 (1980).
48. Note, 20 *Ariz.L.Rev.* 915, 942 (1978).
49. *United States v. Peltier*, 422 U.S. 531, 555 n.14 (1975) (Brennan, J., dissenting).
50. Judge Henry Friendly has written this of the "good faith" exception: "It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *Calif.L.Rev.* 929, 953 (1965).
51. *United States v. Peltier*, 422 U.S. 531, 553 (1975) (Brennan, J., dissenting).

52. *Id.* at 557, n.18.
53. *Id.* at 560.
54. Kaplan, *supra* note 11, at 1045. Proponents of the "good faith" approach have made similar statements. See, e.g., Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J.Crim.L. & C. 635, 655 (1978), noting that "the court is unlikely to have anything before it other than the officer's assurance that he was convinced he had probable cause" and that this "testimony, whether truthful or perjured, is almost impossible to refute"; and Note, 20 Ariz.L.Rev. 915, 933 (1978), observing that good faith "will usually be asserted by the officer and will be difficult to disprove absent evidence of some statement by the officer indicating malicious intent."
55. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 436 (1974).
56. *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., joined by Harlan and Stewart, JJ., dissenting).
57. Ball, *supra* note 54, at 655; Bernardi, *supra* note 47, at 104; Note, 20 Ariz.L.Rev. 915, 933 (1978).
58. Kaplan, *supra* note 11, at 1044.
59. *United States v. Peltier*, 422 U.S. 531, 560 (1975) (Brennan, J., dissenting).
60. *Id.* at 553.
61. Ball, *supra* note 54, at 653. See also Recent Development, 34 Vand.L.Rev. 213, 227-28 (1981).
62. *United States v. Rabinowitz*, 339 U.S. 56 (1950), overruled by *Chimel v. California*, 395 U.S. 752 (1969).
63. Amsterdam, *supra* note 55, at 394.
64. *United States v. Peltier*, 422 U.S. 531, 560 n.20 (1975) (Brennan, J., dissenting).
65. Wishman, Evidence Illegally Obtained by Police, New York Times, Sept. 21, 1981, at 21, col. 3.
66. See generally S. Schlesinger, Exclusionary Injustice: The Problem of Illegally Obtained Evidence (1977).
67. Schlesinger, It is Time to Abolish the Exclusionary Rule, Wall Street Journal, Sept. 10, 1981, at 24, col. 4.
68. 392 U.S. 1 (1968).
69. *Id.* at 13.
70. *Johnson v. United States*, 333 U.S. 10, 14 (1948). And thus understandably will "push to the limit" any authority they are given by the courts. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).
71. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J.Crim.L.C. & P.S. 255, 258 (1961).
72. Lowenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 U.M.K.C.L.Rev. 24, 29 (1980).
73. See *Stone v. Powell*, 428 U.S. 465, 501, 538, 540 (1976) (Burger, C.J., concurring, and White, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 612 (Powell, J., concurring, joined by Rehnquist, J.); New York Times, Sept. 11, 1981, at 9, col. 3 (O'Connor, J., testimony at confirmation hearings).
74. 428 U.S. 465 (1976)

Senator MATHIAS. As the second panel is coming to the table, I will take this opportunity to place in the record, without objection, a statement on behalf of the Senator from Utah, Mr. Hatch.

[The prepared statement of Senator Hatch follows:]

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, it is a pleasure to be provided the opportunity to participate in this hearing, before the Senate Criminal Law Subcommittee, on the Exclusionary Rule.

Our system of justice was established with the determination of truth as its primary goal. Under this system the state has the burden of proving the guilt or innocence of the accused. The assumption is that through the examination of all of the evidence gathered by the state the court will be led to a decision which is as close to the truth as humanly possible. These basic principles of justice were greatly compromised with the adoption of the Exclusionary Rule. The Supreme Court first suggested possible judicial action as a means to curtail continued abuses of authority by law enforcement agencies ninety-six years ago in *Boyd v. United States*, 116 U.S. 616 (1886). This resulted in the Court later instituting the so-called Exclusionary Rule, in lieu of any constitutional sanction, in *Weeks v. United States*, 232 U.S. 383 (1914). This judicially mandated doctrine was intended to serve as a deterrent to abusive Federal law enforcement practices. The rule, also referred to as the "Weeks Doctrine" or the "Suppression Doctrine", was subsequently extended to encompass the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

Let me again emphasize that the Exclusionary Rule is a concept of judicial origin, created as a means of protecting the rights guaranteed by the 4th, 5th, 6th, and 14th Amendments to the Constitution of the United States. The Exclusionary Rule is not an obligatory element of the 4th Amendment, but merely the means which the Court in *Weeks* chose to adopt to enforce the guarantees of the 4th Amendments. The Court reasoned that exclusion was the only sanction or remedy that would effectively compel respect for and secure police compliance with the rights guaranteed by the Fourth Amendment. An analysis of recent Court decisions clearly indicates that this is not the view held by the majority of Justices on the current Court. As stated in a past decision of the court with respect to the Exclusionary Rule, "The rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. at 217 (1960).

From its inception, however, the Exclusionary Rule has drawn extensive criticism for the many flaws in logic and operation inherent in the premise on which the rule is based: deterrence. The logic of this deterrence theory was severely questioned nearly 30 years ago, when Justice Jackson noted:

"That the rule of exclusion and the reversal results in the escape of a guilty person is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, remedy against one law-breaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." *Irvine v. California*, 347 U.S. 128, 135 (1954).

Later, ten years after the rule had been applied to the states, Dallin Oaks did an exhaustive study in search of the so-called deterrent effect. His conclusion is just as valid another twelve years later:

Today, more than fifty years after the exclusionary rule was adopted for the Federal courts and almost a decade after it was imposed upon the State courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness. 37 Univ. of Chicago L. Rev. 665, 672 (1970).

The Attorney General's Task Force on Violent Crime recently faulted the Exclusionary Rule with "barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial." Task Force Final Report, page 55.

Many of the cases to which the rule is applied involve unintentional violations of the Fourth Amendment protections, such as technical errors in the filing or serving of the search warrant. It is impossible to deter actions which are either unintentional or performed with the belief that they are in compliance with the standards required by the Fourth Amendment. Justice Cardozo best summarized the rule's flaws in authoring a unanimous opinion for the New York Court of Appeals, in *People v. Defore*, 244 U.S. 13 (1926): "The criminal is to go free because the constable has blundered."

Rather than subsiding, the criticisms of the exclusionary rule have augmented in recent years, particularly since the 1961 decision in *Mapp*. This is perhaps a reflection of Justice Holmes' statement that "The life of the law is not logic; it is experience."

Efforts to repeal the rule have been thwarted in the past by the widely held misconception that the rule is constitutionally mandated and that its repeal is somehow tantamount to a repeal of the 4th Amendment. However, the Court itself recognizes that, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *U.S. v. Calandra*, 414 U.S. at 348 (1974).

The costs of the Exclusionary rule were recognized in *Stone v. Powell*, 49 L.Ed. 2d 1067 (1976):

(1) The focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding (i.e., it deflects the truthfinding process and often frees the guilty).

(2) The evidence excluded is typically reliable and extremely probative.

(3) The concept of proportionality is often offended. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." This in turn may generate disrespect for the law and the administration of justice.

The list of critics and criticisms grows steadily and becomes increasingly more persuasive with every assertion that the rule releases "countless guilty criminals." (Chief Justice Burger, 403 U.S. at 416).

In *Bivens v. Six Unknown Federal Narcotics Agents* 403 U.S. 388 (1971), Chief Justice Burger recommended this course of action:

"Reasonable and effective substitutes can be formulated if Congress would take the lead; as it did for example in 1946 in the Federal Tort Claims Act. I see no insurmountable obstacle to the elimination of the Suppression Doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials."

It would seem that the Supreme Court has thrown down the gauntlet and it is Congress' responsibility to answer that challenge. The Senate is more disposed now than at any other time in recent memory to legislate a reasonable and workable alternative. The hearings now underway in the Senate Judiciary Committee have this purpose in mind.

I am particularly pleased to see Judge Malcolm Wilkey's name on the witness list today. Judge Wilkey provides us an insightful review of the judicial origins of the rule and the results flowing from its application in his recent report entitled, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule." I would strongly urge my Senate colleagues to read this work, which I believe has made a signal contribution to the study and understanding of this subject. His paper deserves the widest possible readership among opinion and decision makers, the judiciary, and the general public.

Senator MATHIAS. It is now our great pleasure to welcome to the committee Judge Malcolm R. Wilkey, a judge of the U.S. Circuit Court of Appeals, and it is also a pleasure to have Mrs. Wilkey with us today. We also have Prof. Yale Kamisar of the Law School of the University of Michigan.

STATEMENT OF MALCOLM R. WILKEY, U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS, AND PROF. YALE KAMISAR, UNIVERSITY OF MICHIGAN LAW SCHOOL

Judge WILKEY. First of all, I want to express my appreciation to the chairman and the other Senators, Senator Specter and other

members of the subcommittee, for the invitation to appear here. This is a subject in which I have been interested for a large number of years. It is a very important subject in the administration of justice. The impact on our court system because of the exclusionary rule is demonstrably large. We judges have an interest in it for this reason.

I want to emphasize the difference between the position I am free to take here before this committee, which is considering policy and choices, and my role as a judge on the court of appeals.

As a judge on the court of appeals I am bound by the Supreme Court's decisions and I follow them as carefully and as honestly as I can, the same way that I follow the statute passed by the Congress.

Senator MATHIAS. I think we understand that distinction here. In fact, when Justice O'Connor was sitting at that table we asked her a great many questions that I think—without reflecting on my colleagues—were unfair in that they tried to elicit her views on various subjects likely to be before the Supreme Court. And, of course, her personal views really should be irrelevant. What is important is that she assure this committee that she is going to follow the precedents of the court, follow the law.

So, we understand that is your position.

Judge WILKEY. And that is precisely what I shall do after this committee and the Congress acts on these matters before it. Whatever verdict you come out with, that is what our court will follow.

I came here and previously submitted a statement of my testimony before this committee. My testimony offered is a monograph entitled "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," which was published by the National Legal Center for the Public Interest, Washington, D.C., on or about the 10th of March, this month.

At the time I was invited to appear before this committee, I was also invited by the center to write this monograph. And so I was determined to write the monograph as my testimony and to offer it as being helpful to the committee in considering the proposed legislation.

Insofar as I was capable, I set forth in this two page outline—pages 8 and 9 of the monograph—my line of logic in first examining the present exclusionary rule and its effect, and then coming in a positive manner to enforcing the fourth amendment by some more logical and effective alternatives, which do not carry the horrible side effects which go along with the exclusionary rule.

I offer this monograph and ask that it be included in the record of this hearing.

JUSTICE IN THE COURTS EQUAL TO JUSTICE IN THE SENATE

Before answering questions, I had desired to comment only on one other specific point. I see that I have already been anticipated. But I want to call to the chairman's and the committee's attention that the recent Senate action in regard to Senator Williams illustrates the illogic and injustice of the rationale of the exclusionary rule, and it illustrates the wisdom and fairness of the reforms which I propose in my testimony.

For the exclusionary rule has always been condemned for confusing the question of the guilt of the accused with the question of the conduct of the officers. The chairman has indicated he fully understands that distinction.

My alternative proposed remedies would separate these two different inquiries into the guilt of the accused and the conduct of the officer.

I suggest that the Senate recognized this distinction in the recent proceeding dealing with Senator Williams.

Senator Williams contended that the Senate should inquire into the conduct of the FBI at the same time it examined his conduct, on the theory that the FBI misconduct would excuse his own. In fact, Senator Williams was invoking the rationale of the exclusionary rule.

The Senate, very properly, rejected this. The Senate properly recognized that Senator Williams' fitness to sit in the Senate was a quite different issue from the conduct of the FBI. Whatever the FBI did could not alter what was shown of Senator Williams' actions on those seven tapes.

The Senate will examine FBI conduct, as the chairman has just told us. But it will be a separate inquiry because the findings on the FBI's part will not alter the issue of Senator Williams' fitness or the judgment thereon.

Similarly, the conduct of the officer can never alter the fact of material evidence found in a search and seizure.

Therefore, I submit to you that in the last 2 weeks:

First, the Senate, by its own action has already recognized the illogic and injustice of the exclusionary rule, and;

Second, I call attention to each of my proposed alternative remedies to enforce the fourth amendment and I point out that each of these remedies is designed merely to permit the courts to follow the same reasonable and fair procedure that the Senate did by separating totally unrelated issues.

Both the guilt of the accused and the conduct of the investigating officer must be inquired into, but not at the same time, for the truth in regard to the guilt of the accused is not altered by the conduct of the officer. And that is exactly what the Senate determined by its procedure adopted in regard to Senator Williams.

At this point I had planned to offer myself for questioning by the Senators. I do so. Or I have a few comments that have been generated by the previous testimony, which I might go into. Whatever is your pleasure.

Professor KAMISAR. I would suggest that Judge Wilkey will have a few more comments after I get through. And really Professor La Fave never had a chance to respond to many of the points Professor Blakey made because you came in and asked him some other questions.

I would respectfully request, and it would be better, I think, if the judge could hear me because I will be talking about him specifically. I just think it would give him a chance to wind up as well as begin.

But I am bursting at the moment.

Senator MATHIAS. We do not want to have any accidents this afternoon.

If the judge has no objection, you may proceed.

Judge WILKEY. That is perfectly agreeable to me.

Senator MATHIAS. But we will reserve to him a chance for rebuttal.

Judge WILKEY. I do want, on the positive side though, to say that I associate myself in general with the very perceptive comments of Prof. Robert Blakey. I think his views on the constitutionality of these matters and the practicalities of it are very much along the line of my own.

Professor KAMISAR. Mr. Chairman, Senator Specter: It is a great privilege and pleasure to be here.

I do have a statement that I think responds to some of your questions and responds to some of the points that have been made, and along the way I will try to weave in responses to others as they have come up. And then, finally, I will say something very briefly about Mr. Blakey's remarks.

I should say at the outset that I have been interested in this subject for 25 years. I guess the first article I wrote on the subject was back in 1959, on the so-called silver platter doctrine, attacking the doctrine that if the State police get the evidence illegally and turn it over to the Federal police on a silver platter, the Federal authorities may use it in a Federal prosecution. And I was just reminiscing with Judge Wilkey a couple of hours ago about that. A year after I wrote the article Judge Wilkey, then the head of the criminal division, defended the silver platter doctrine and lost, despite an able argument, 5 to 4. And then I recall 2 years after I wrote my article, *Mapp* came down and a number of articles were being written about *Mapp*. One of the most powerful articles, and the most interesting, because it quoted a lot of current thinking in Pennsylvania, was written by a then young assistant prosecutor named Arlen Specter.

The question Senator Specter asked then was: What is going to happen when the dust settles? And I did not think that 20 years later I would be before him trying to figure out what happened.

Well, let me begin by asking the question: Why this hostility toward the exclusionary rule?

Now, I notice that Professor Blakey called it the suppression doctrine. You know, that is a little Madison Avenue touch. Suppression doctrine sounds evil and so forth. I think exclusionary rule is bad enough. I will call it the exclusionary rule.

I think a recent law office search case makes the points, because it arises in a setting so unlike the typical search and seizure. This is a Minnesota case called *O'Connor v. Johnson*, where the St. Paul police obtained a warrant to search a lawyer's office for business records of a client suspected of engaging in criminal activity. The lawyer happened to be there and he persuaded the police to go to the judge who issued the warrant to talk this thing over and try to persuade the judge he never should have issued a warrant; he should have proceeded by subpoena duces tecum. Well, after various maneuvers the lawyer prevailed.

Now, to me the most interesting feature of this extraordinary case is the police never actually seized, let alone searched, the lawyer's work product file; thus the courts were able to rule on the legality of the police action in an adversary proceeding before a

search or seizure was carried out, before anybody knew what was in that file.

Mr. O'Connor did not need an exclusionary rule. But almost all victims or potential victims do. The *O'Connor* case is not a typical case because usually there is no way that a potential victim of unreasonable search and seizure can invoke advance protection. And that is why we have the exclusionary rule. All the exclusionary rule amounts to is an after the event adversary proceeding.

Now, in this respect freedom from unreasonable search and seizure differs from most other constitutional rights. As Justice Jackson once said, any effective interference with freedom of the press or freedom of religion usually requires a course of suppressions against which the citizen can go to court and obtain an injunction. Other rights, such as the right to an impartial jury, or the right to counsel, are within the supervisory power of the courts themselves. But illegal search and seizure is perpetrated by surprise, conducted in haste, beyond the court supervision, and it is all over before the courts can do anything.

Now, that is not true of self-incrimination. Nobody can make you answer. You have an adversary proceeding and you can properly invoke the privilege against self-incrimination. The attorney-client privilege, nobody can make the attorney answer. There is an adversary proceeding.

Now, there are many, many examples of this. We have in the Constitution the speech and debate clause. And for any speech or debate in either House, the Senators and Representatives shall not be questioned in any other place. If a Senator or Representative thinks he has the protection of that clause, he can invoke it in advance. He does not need an exclusionary rule. But if some day the police were to raid the files of Senators' offices or they were to bug conversations between a Senator and his aides and then they would have the information they were not supposed to get, we would need a speech and debate clause exclusionary rule, and we ought to have one. Fortunately, the Senate is strong enough and powerful enough that the police would not do that. Unfortunately, many of the victims of search and seizure are not.

Now, the fact of the matter is that nobody can stop the police from carrying out a search and seizure, not even a lawyer. Miss Mapp had a lawyer. Her lawyer arrived on the scene. The police forcibly prevented him from getting into the house while they carried out a very, very thorough search of the house. That is much more illustrative of the problem than the law office search that I had talked about.

So, there is a strong need for the exclusionary rule in the search and seizure area. Unfortunately, there is strong resistance to the rule because almost always the court is asked to unring the bell, and it is awfully hard to do. Now we know what the evidence is, and now it is no longer an issue in the abstract, and now the fourth amendment flaunts before us the price we pay for it. But it seems to me that if the police were obeying the law, they would not have made the search in the first place, and we would never know specifically what cases were lost, but theoretically the same number of cases would be lost.

You know, we often hear—we have not heard it today yet, but it is hard to go through a day on this issue without hearing Cardozo's famous statement: "The criminal is to go free because the constable has blundered." Well, that is a great slogan, but if you analyze it, it seems to me it does not hold up. As is pointed out in a very fine article published recently in the Georgetown Law Journal by William Mertens and Prof. Silas Wasserstrom, if you mean by a blunder that the police officer did not have probable cause to make an arrest or did not have reasonable grounds to make a search, then the criminal goes free because he would have gone free if the constable had not blundered. If the constable had not blundered, had not made an arrest or search without probable cause, we would not have anybody in custody, we would not have any prosecution. So, it is not that he is going free because the constable has blundered. It is because he would have gone free if the constable had complied with the law. It seems to me that if you put it that way, it comes out differently.

All right. Professor Blakey says we should not freeze the Constitution. Well, I am all in favor of not freezing the Constitution. And I am all in favor of Mother's Day and apple pie. Who is freezing the Constitution? It seems to me you freeze the Constitution if you abolish the exclusionary rule. The fact of the matter is, if you look at the history of the fourth amendment, it is overwhelmingly clear that the primary thing that concerned the framers of the fourth amendment were general search warrants. That was the problem. You know there were no police departments in 1790 or 1780. We forget how different it was. We did not start getting police departments until the middle 1800's. We had some night watchmen. The framers of the fourth amendment were not concerned about warrantless arrests. They were concerned about tax collectors, revenue agents. They were concerned about these damn general warrants that gave the King's agents so much power. And they thought that if they could control search warrants, they could control searches. That is why they probably never thought about after the event control of searches.

Most colonial judges did not issue general warrants. Most refused to issue such warrants. They took the warrant procedure seriously. You ask any scholar about how the search warrant procedure works today and they will tell you it is a joke. I mean the courts are so overloaded they often just sign the warrants without reading the affidavits. I have cited many articles to that effect in my prepared statement.

Moreover and more fundamentally, the great bulk of searches and arrests are made without any warrants at all, and that is conceded by Wayne Schmidt in his testimony, and so forth.

Take what, so far as I know, was a representative year in New York. According to the commentary of the American Law Institute's Model Code of Pre-Arrest Procedure, in 1 year there were 150,000 arrests and less than 400 were with warrants. And the great bulk of searches are made incident to arrests. So, the point is, if you do not have an "after the event" control by the courts, you do not have any control at all. Nowhere else in the criminal process will there be any opportunity to test the legality of the search and seizure. The police will be "judges in their own

cause." There will be no check on the police at any point in the criminal process if we abolish the exclusionary rule.

All right. Now, I too, am in favor of not freezing the Constitution. I think that if you look at the original purpose of the fourth amendment—to subject the police to legal restraints, to provide a judicial check on executing officers, not to allow the awful instruments of the criminal law to be entrusted to a single functionary, not to let the executive officers be judges in their own cause—you cannot abolish the exclusionary rule. If you do, the majestic fourth amendment will look like a huge whale stranded helplessly on the beach after the tide has gone out.

Now, the late Alexander Bickel viewed the contest established by the first amendment, and as the Supreme Court viewed it in the Pentagon papers case, as follows:

Once the press gets hold of newsworthy documents, even though the press is aware that they have been stolen, the press may publish them with impunity. Bickel says the duty of the press is to publish, not to be concerned with the morals of its sources. These responsibilities rest elsewhere. The press is a morally neutral, even an unconcerned, agent as regards the providence of newsworthy material that comes to hand.

Now, why do I mention this doctrine? Because this approach has been called "the law of the jungle," and if the exclusionary rule were abolished this approach would govern criminal prosecutions as well. This approach may be a defensible reading of the first amendment, but not of the fourth. A criminal court is not, or should not be, a morally neutral, even an unconcerned agent, as regards the source of relevant evidence that comes before it.

I realize that *Marbury v. Madison* is a complicated case and different in many ways, but there are some themes running through that case that are consistent with those running through the great *Weeks* case, which established the exclusionary rule in 1914.

In *Marbury*, John Marshall deemed the doctrine that courts must close their eyes on the Constitution and see only the act of Congress as subversive of all written constitutions.

In *Weeks*, the Government asked the courts, in effect, to close their eyes on the fourth amendment and consider only the probative value of the evidence gathered by the police. And the *Weeks* Court, it appears, viewed such an argument subversive of the fourth amendment. I think the *Weeks* case can be read very narrowly as a defensive use of constitutional review.

The courts, after all, are the specific addressees of the command "no warrants shall issue, but upon certain conditions." That's a message to the courts. If the police search without a warrant and bring the produce of their action before the courts, the court that excludes the produce is only protecting its own jurisdiction. The court is only defending its jurisdiction by reviewing the legality of the search and seizure, something it should have done to begin with, but for the exigencies of law enforcement work. And I think that is the reasoning behind *Weeks*. If not even an order of court would have justified the police action, said the *Weeks* Court, then how can we justify the police proceeding on their own without an order of court? And if the Government did proceed on its own without sanction of law, and comes back here, how can we ratify what

they did when we wouldn't have allowed it if they had come to us before the search? The Government whose agents violated the Constitution, should be in no better position than the government whose agents obeyed it. OK.

Senator SPECTER. Professor Kamisar.

Professor KAMISAR. Yes.

Senator SPECTER. Are you suggesting that if the court would have issued the warrant in the first instance, that it should ratify?

Professor KAMISAR. No. I am saying if the police had come to the courts in the first instance, presumably they would have said: "We are not going to give you a warrant because you don't have enough information." Because they did not come to the courts and ask them, they should not be able to come back later and say: "Well, we have got it; do not look at it; do not consider how we got it."

Senator SPECTER. In a great many cases when the police come to the court and they do not spell out the probable cause or there is a defective statement of probable cause, the search and seizure is invalidated. The police officers may have had probable cause that is spelled out at a later time, but the warrant is invalidated. So, your ratification theory would suggest, well, that if there really were probable cause, it would be appropriate to uphold the search whether or not the procedures had been followed.

Professor KAMISAR. We are talking about two different kinds, one where the police never had probable cause and could not have gotten a warrant, and one where they had probable cause, but did not bother to get a warrant. If they had bothered to apply for a warrant, they would have gotten it. Well, as to that, you know, there is a deeply rooted doctrine that where it is feasible, where it is practical, the police ought to get a warrant unless there is some reason why they could not. And, as to that, I guess I would say that I think it is desirable to have on the record what information the police say they have. I am a little skeptical, but it seems to me that the real virtue, probably the practical value of a warrant, is that whatever the police say they have is down there and it is frozen, and not subject to reconstruction a year after the event. You know, that is the problem. Put down what you have got; we know what you have got.

Senator SPECTER. Give them a 10-day rule? Allow them to rescind in reverse within 3 days?

Professor KAMISAR. Well, you know, we hear a lot about—

Senator SPECTER. Bear on your constable blundering. Maybe that is really the answer to your analysis on the Cardozo line.

Professor KAMISAR. Well, I would certainly give weight to the fact that the police got a search warrant. The court has said that and, frankly, I do not think it has carried out what it has said very much. I certainly would say that in a close case certainly. I mean I do not want the good-faith test at all. But I could live with the good-faith test, good-faith reasonable test where the police get a search warrant, because I feel so strongly that we ought to encourage the police to get search warrants rather than discourage them. And I think in the past we have discouraged them. But it seems to me the notion of the search warrant is, sure; if you're pursuing someone in a great rush—there are all sorts of reasons and I think the courts have been very, very fair about that, have been very un-

derstanding, all sorts of reasons why you don't have to get a warrant. But, if you had all the time in the world, if the suspect has been in his home for 10 days, and in some cases the person was there months, and no opportunity, no likelihood of fleeing, why not come to the court in advance so the court can decide whether you have probable cause or not.

Now, we could argue about that, but it seems to me that certainly is the idea of the fourth amendment.

Senator SPECTER. Well, your analysis on the constable blundering is that when the constable blunders, does not have probable cause, makes the search and seizure, gets incriminating evidence, then he had no reason to do what he has done, so he has blundered into a case. If he had gone to a magistrate and presented the situation, no probable cause, no search warrant. But there is another situation where he had probable cause but he didn't go to a magistrate or he went to a magistrate and he didn't articulate it properly or he forgot to swear to the warrant.

So, would you suggest that if the police officer can return within a day after obtaining incriminating evidence and satisfy the requirements of probable cause, that it would be constitutional search and seizure?

Professor KAMISAR. Well, I was saying there are two different kinds of blunder. You are raising a different kind of blunder.

I guess my answer to you would be that I would stretch, you know, what constitutes an excuse for not getting a warrant. And I would certainly allow testimony at the time of the application, as well as the affidavit itself, you know, if there is some record of the testimony at the time.

But, I guess, to be honest with you, I do not want the police coming back after they have talked to the prosecutor and after they have thought about it some more and now, according to various empirical studies, reconstructing what constituted probable cause.

Senator SPECTER. But if they talk to a smart prosecutor in advance they could almost invariably state probable cause.

Professor KAMISAR. Well, I guess I want them to talk to smart prosecutors in advance because I think some of the smart prosecutors might educate them about the law of search or seizure. And I think that is how the exclusionary rule works, in fact.

A point I wanted to make later is a point made before the subcommittee by the Maryland attorney general, Steve Sachs. Based on his own experience as a prosecutor, Sachs thinks the exclusionary rule works very well; it works every day; and he thinks that among Federal prosecutors—and that is all we have before us, the Federal exclusionary rule—he thinks it does work quite well. And I guess that I have enough confidence in prosecutors to think they will say to an officer:

Well, look, you damn fool, you cannot do this. You cannot rely on the kid sister's consent. If you do, it is not going to hold up in court.

I mean I am all in favor of encouraging talks with prosecutors before the event, not after.

Well, all right.

I realize that I have not answered Cardozo's argument completely, but you are quite right. It depends on what you mean by blunder. But I am saying, at least for one kind of a blunder that slogan does not hold up.

Senator SPECTER. What I am suggesting to you is that a great many times when the police have a sense to conduct a search and seizure and they come in with an affidavit, which I have seen lots of, and it is palpably insufficient, if you question the police officer enough there is something that has led him to his point, which if probed, pushed, and expanded upon, you really find out what he has got in mind.

Now, sometimes he does not have anything in mind. And if he does not have anything in mind, there is nothing you can do about it. The matter is at an end.

But applying some imagination, where he has some counseling, probable cause can be stated and a valid warrant can be constructed.

Professor KAMISAR. Well, I'm hoping the prosecutor would say, look who was the anonymous informer. And the officer would say, well, frankly, we don't know, or, frankly, it was—who was the unidentified informer, and, frankly, we made it up, or, frankly, it's an anonymous phone call. I'm hoping that there will be some interplay between the prosecutor and the police officer and that's why I would encourage that. Now, sure, if the police are lying and if prosecutors are lying, well, we have to assume, you know, a certain amount of integrity in the system.

OK. Well, now, I can hear the opponents of the exclusionary rule now. We are not against subordinating police action to legal restraints, they are saying, we are only against doing so when the Government seeks to use the fruits of the police illegality. This happens to be the time when the defendant has the maximum incentive to challenge the police conduct, and if he is an indigent, as many criminal defendants are, he also has the services of court appointed counsel. No, say the opponents of the exclusionary rule, let us have no judicial check on the discretion of Government officials in a criminal prosecution against the victim of the police illegality or possible illegality. Let him bring a private lawsuit, let the victim, if he is willing, rouse the police and if he is able to find a lawyer willing to take on a team—and I quote from Tony Amsterdam's article:

A team of professional investigators and testifiers, often without fee, and risk the chance of earning a reputation as a police-hating lawyer.

So far as I can tell none of these bills provide for assigned counsel when these people bring private actions. If they were wealthy and prominent, they probably wouldn't be the victims of police illegality. Most of the criminal defense lawyers and public defenders who have spoken on the subject say that there is no way that a lawyer would be interested in handling this private lawsuit. There is no real prospect of any gain, there is no likelihood of any substantial recovery on a contingent fee basis. I notice that the spokesman for one of the police groups, Sue Johnson, who represents the police executives of major jurisdictions, just ripped to shreds the ef-

ficacy of the civil remedies proposed in these bills, saying it just wouldn't amount to anything.

All right. It seems to me if a test of the legality of a search is going to amount to anything it should be done during the criminal process. Look, the protagonists are in place, the police witnesses are there—the defendant is there, the defense lawyer is there, let's do it then. That's the logical time to do it.

Now, what the opponents of the exclusionary rule are saying is, we don't want the courts to close their eyes on the Constitution permanently, just long enough to convict the person and send him to prison on the basis of evidence obtained in violation of the Constitution and then we can get around to deciding later whether it was legal or not. I do not think that is the way the system is supposed to work. American criminal procedure—said the Attorney General's committee 20 years ago, the Attorney General's Committee on the Administration of Federal Criminal Justice—American criminal procedure imposes procedural regulations on the criminal process by constitutional command. Now, a fast developing situation and other exigencies of law enforcement work, may preclude meaningful challenge at the earliest stages of the criminal process, but why does it follow that no meaningful challenge should be permitted at any stage of the criminal process? Challenging the legality of a search or seizure at some stage of the criminal process, when it is practicable to do so, when the defendant is in custody, when the evidence has been gathered, when the evidence cannot be destroyed and the defendant cannot run away—why not do it then? That is all we are talking about. That is all the exclusionary rule means.

Now, I am well aware—and this point was raised earlier—that critics disparage the exclusionary rule as merely a judge-made rule of evidence. Judge Wilkey said in his testimony before the Attorney General's Task Force on Violent Crime last June, "This rule of evidence does not come from on high. It is man made, not God-given * * *. It is not even in the Constitution."

Well, I must say that it does not strike me as a very powerful point, not at least until someone can name me one Supreme Court decision—one—that is not a matter of judicial implication, that was not man made. I think the closest analogy to the fourth amendment exclusionary rule would be the rule barring the use of involuntary confessions, even though the confession is corroborated by physical evidence and therefore trustworthy.

Now, the critics of the exclusionary rule like to distinguish the confession cases. They say: "Well, coerced or involuntary confessions are untrustworthy, but the evidence you seize illegally is reliable." Well, that is true and it is not true. Originally the only basis for the rule barring coerced confessions was that it was untrustworthy. But it became clear by the 1960's if not 1950's—and I can cite you many cases: *Watts v. Indiana*, 1949; *Rogers v. Richmond*; *Jackson v. Denno*; *Spano v. New York*; *Haynes v. Washington*; and so forth—it became clear that the Court was throwing out confessions even though they were reliable, because the Court wanted to show its disapproval of certain objectionable police methods. Now, that whole doctrine is "judge-made."

If you read the Constitution you will not find a word about confessions, about voluntary, about involuntary, about coerced. Now, take any famous case you can think of: the reapportionment cases, the school prayer cases, clear and present danger test, the symbolic speech case. Take the recent *Richmond Newspapers* case, establishing the media's right of access to criminal court proceedings. The Chief Justice who wrote the lead opinion, admitted that this important right is not explicitly defined or articulated in the Constitution.

Now, some years ago, when he was then a member of the Supreme Court, Justice Stewart was an observer at a conference of journalists, lawyers, and judges discussing legal problems of the press. And even though he was only an observer and wasn't supposed to take part, the press got so angry at the judges who were at the conference that Justice Stewart could contain himself no longer, and he interrupted, and this is a transcript that has been published, and said:

Where, ladies and gentlemen, do you think these great constitutional rights that you were so vehemently asserting, where do you think they came from? The stork didn't bring them. They came from the judges of this country, from the villains sitting here at the table.

Well, I'm perfectly willing to concede that the stork didn't bring the exclusionary rule. But I'm still waiting for someone to name me one constitutional rule or one case the stork did bring.

So far, I have said nothing about the efficacy, or inefficacy, of the exclusionary rule in reducing the police incentive to commit illegal searches or seizures. Now, one would never suspect this from the arguments of the opponents of the exclusionary rule, and I admit one would not expect it from recent opinions of the Supreme Court, such as *Calandra*, but nowhere in the *Weeks* case is the exclusionary rule called a remedy and nowhere in the opinion is there any discussion of the effectiveness of the exclusionary rule versus the effectiveness of tort remedies or other alternatives.

The idea of deterrence is not expressed in *Weeks*, nor is it expressed for the next 35 years. The first time it ever comes up, so far as I can tell, was 1949, the year of the *Wolf* case. The court that decided *Weeks* and the courts that adhered to the *Weeks* doctrine in subsequent decades may have hoped or expected that the exclusionary rule would significantly influence police behavior, but there is no suggestion in all this time that the rule's survival depends on proof that it is having this effect. However, disturbing this may be to some people who feel that every problem has to be subjected to cost-benefit analysis, the basic scheme of reasoning on which the Federal exclusionary rule was established and reaffirmed for the next three decades is fairly simple, and I reread every case from 1914 to 1949. It's a condemnation of unconstitutional police conduct, a refusal to sanction, an unwillingness to let the Government whose agents have violated the Constitution profit from its own wrong. And there is no need to measure, and there is no measurement, in any of those cases of the extent to which the rule has actually reduced the incentive to flout the Constitution. There is no need for empirical data at all.

Compare this with the rule excluding coerced confessions, even though reliable. This rule does not depend on its deterrent affect

either. Sure the courts hope or expect it will significantly influence police behavior. But suppose 20 or 30 years after the Supreme Court had first started to throw out coerced confessions someone came in and argued: "It is not doing any good, your Honors. The police interrogators are as bad as they ever were. So, let it in." I mean at least let in the reliable confessions, even though they are a product of police misconduct. The fact of the matter is that all those years the Court was throwing out coerced but reliable confessions, it was a crime not to let—in many States—not to let a lawyer see his client, it was a crime to falsely imprison people, it was a crime to hold them incommunicado. There were all sorts of tort remedies against false imprisonment and assault. The Court did not give a damn. All the Court saw was this product of police illegality and it was not going to stand for it. This approach, it seems to me was the original and basic, and, it seems to me, a quite understandable and logical view of the exclusionary rule.

Now, I hasten to add that I am not conceding that the exclusionary rule does not deter. And I am happy to notice that Professor Blakey said that it does deter, at least to some extent.

Look at what happened. The best evidence that we need the exclusionary rule, the best evidence that it works, is the reaction of law enforcement people to the adoption of the exclusionary rule. When it came down in New York City, and the State of New York admitted evidence until 1961, the Police Commissioner said: "*Mapp* created tidal waves and earthquakes. Retraining sessions have to be held from the very top administrators down to each of the thousands of foot patrolmen."

Why? Why did *Mapp* require retraining sessions from top to bottom? What was the old training like?

In theory, *Mapp* has nothing to say about the content of the law of search and seizure. In theory, *Mapp* did not reduce lawful police powers one iota. What was a lawful search or seizure before *Mapp* still was. What were excuses for getting a search warrant before *Mapp* were still excuses.

Now, before *Mapp* was decided, the New York courts admitted illegally seized evidence on the premise that no exclusionary rule was needed because existing alternative remedies were adequate to effectuate the guaranty without excluding the evidence. And, of course, Judge Cardozo, in a famous opinion, pointed to the alternatives. Judge Cardozo said—and people forget what he said—his first alternative—to show you how absurd this thing is—I mean Judge Cardozo was a wonderful scholar; but he lived a sheltered life; sort of removed from reality;—the first alternative to excluding the evidence is: "The officer might have been resisted." Terrific. You go ahead and you fight the officer. You shoot him or you stab him. You engage him in a physical battle. That was the first alternative to the exclusionary rule. Or the officer might have been sued for damages or prosecuted.

I would like to ask Professor Blakey to name me one case, one case in 100 years, where a police officer was prosecuted for an illegal search and seizure—a simple unaggravated illegal search and seizure. The police did not actually break the suspect's skull or break his leg or bloody his nose. Just a nice simple unconstitution-

al search and seizure. Name me one case in a hundred years where police officer was prosecuted for that.

[Subsequent to the hearing, Professor Blakey submitted the following material:]

UNIVERSITY OF NOTRE DAME,
LAW SCHOOL,
Notre Dame, Ind., March 30, 1982.

Senator CHARLES MCC. MATHIAS, Jr.,
Subcommittee on Criminal Law,
Committee on the Judiciary, Washington, D.C.

DEAR SENATOR MATHIAS: I appreciate the opportunity you afforded me to share with the Committee my thoughts on the suppression sanction. It is always good to return home. I appreciate, too, the courtesies shown to me by you and your staff during my appearance.

May I impose on you, however, in one additional way?

My old friend, Professor Yale Kamisar, during his testimony, which came after mine, rhetorically asked me, if I heard correctly, if any police officer had, in two hundred years, been prosecuted criminally or civilly for a violation of the constitution's search and seizure provisions without some aggravating factors of physical violence?

The answer is, of course, yes!

As I am sure Yale would concede, wiretapping has been a form of search and seizure, at least since 1967. *Katz v. United States*, 389 U.S. 347 (1967). In 1968, the Congress made illegal wiretapping by police officers a federal offense. 18 U.S.C. § 2511. The statute also includes civil remedies: 18 U.S.C. § 2520. Between 1974 and 1976, a number of police officers from Houston, Texas, were, among other things, indicted and convicted for illegal wiretapping. The details of these prosecutions and convictions are set out and referenced in *Electronic Surveillance: Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance at 163-64* (1976).

I must comment, too, that I am surprised that Yale did not recall these prosecutions, since there is evidence that he was aware of the work of the Commission, as he reprinted parts of our final report in his *Modern Criminal Procedure*, pp. 473-84, (1980).

In addition, Yale surely should have been aware of the Watergate prosecutions (break-in of Democratic National Committee) that occasioned and followed the fall of the Nixon Administration. The "White House plumbers" were, after all, prosecuted for the break-in at Dr. Fielding's office. See, e.g., *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir.), cert. denied, 429 U.S. 1120 (1976). Indeed, Judge Wilkey wrote the court's principal opinion. Other prosecutions include that of Patrick Gray and Mark Felt, the acting Director and an Assistant Director of the FBI, for the Bureau's "black bag" program aimed at radical groups. While I can't comment on the whole two hundred years, where has he been in the last decade? See also *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), cert. denied, 101 S. Ct. 3147 (1981) (civil suit for unlawful wiretapping of newsman by President, Attorney General and Director of FBI).

I would appreciate it if you would insert this letter in your record in an appropriate place, perhaps immediately after Professor Kamisar's question.

Thank you.

Respectfully,

G. ROBERT BLAKEY,
Professor of Law.

Professor KAMISAR. The police reaction to *Mapp* makes plain that the alternatives to the exclusionary rule were woefully inadequate. Otherwise, *Mapp* would not have had so dramatic an effect. And that is clear from the New York experience, where, some years after *Mapp*, the deputy police commissioner said, unaware that a New York Times reporter was in the audience, we're here today to teach you about search warrants even though you have been on the force 10 years, because until now the evidence came in and the feeling was "why bother."

Now, we turn to an article by Senator Specter a year after *Mapp v. Ohio*: "Long standing police practices have been violently uprooted." Philadelphia police officers, who for years had presented their evidence in court without any regard to how it had been obtained, could not understand the subtleties of what constituted a legal search and seizure. In New York they called *Mapp* an "earthquake" and in Pennsylvania they called it "a hurricane," at least one judge called it "a hurricane that swept over our fair land."

Well, I must say, I'm sympathetic to the police. Obviously, before *Mapp*, they weren't trained in the law of search and seizure. Obviously, their superiors didn't think it was important to teach them the law on this subject before *Mapp*. But I must say I don't see how anyone can read Commissioner Murphy's remarks or Senator Specter's 20-year-old law review article and claim that tort remedies, or criminal prosecutions, or other alternatives are all that is needed to breathe life into the fourth amendment or claim that the exclusionary rule does not significantly affect police behavior. If it does not, then why did law enforcement officials react to the adoption of the exclusionary rule as if the fourth amendment had just been written? Why did they develop training programs on the law of search and seizure after *Mapp* was handed down, but not before?

When opponents of the exclusionary rule contend that the police do not know or care or are unlikely to find out what the courts do with the evidence they gather, they overlook prosecutorial screening, which some commentators have said may be the most effective way of enforcing the *Mapp* rule.

I discussed this at some length with Senator Specter moments ago. The decision not to prosecute because the case is based on illegally seized evidence, says Prof. Donald Horowitz, in a very interesting book, the decision not to prosecute, not to go ahead with the case because it is based on illegally seized evidence, is likely to be explained to police officers by prosecutors somewhat more often, more fully, more informally, and in more understandable terms than they are by judges granting motions and dismissing indictments. Fortunately, it is the policy of some prosecutor offices to educate policemen.

Now, of course, prosecutors educate police officers before the search as well as afterwards. In this connection, it is worth recalling what the attorney general of Maryland, Stephen Sachs, said only 2½ months ago, addressing law school professors at the annual meeting in Philadelphia. I was there and I took very good notes, and he said:

I have been a prosecuting attorney in one capacity or another for nine years, and I know the Exclusionary Rule deters law enforcement officers. I know the rule deters every day, all day long.

Prosecuting attorneys are on 24-hour call to consult with members of various police units and IRS, FBI and others, and they ask prosecuting attorneys again and again, if I make a search will this evidence stand up?

Now, last October, when the attorney general of Maryland appeared before this subcommittee, he testified to the same effect. He pointed out the principal, perhaps the only reason that these pre-seizure conversations occur, between FBI agents and prosecutors, is that the prosecutor and the agent want the search to stand up in court.

Now, there have been various empirical studies on the impact of the exclusionary rule, and I could spend a long time on them, but I won't, because I don't think that is our immediate concern. Our immediate concern is not whether Chicago is a gross abnormality and the evidence is strong that it is, that successful motions to suppress—are much, much lower everywhere else than in Chicago, and unfortunately Oaks based his pioneering study on Chicago, the issue is—I think the best you can say is the exclusionary rule works better in some cities than others; it has a greater impact on some police units than others. But that is not our concern. The bills before us deal with Federal law enforcement. And our immediate concern is: Does the rule work in Federal law enforcement?

Now, it seems to me, although the opponents to the rule do not like to talk about it, you cannot get away from the General Accounting Office study. We have been hearing for decades that the rule just does not work, that 50 percent or 75 percent of motions to suppress are granted in some places. Out comes a much more comprehensive study, a much more objective study, a much more sophisticated study, a much more recent study, and what does it show? Only 1.3 percent of cases are lost on motions to suppress, according to a study of 40 prosecutor offices, and almost 3,000 cases. Some opponents of the exclusionary rule counter: well, think of all the cases that are lost before we get to trial. Think of the decision not to go ahead with the case. That is covered by the study also: 0.4 of 1 percent.

Now, I do not think that is too much of a price to pay and I think if the percentage of suppressions granted was accepted by the opponents for 10 years as the standard of success, OK, I will buy that standard—only 1.3 percent cases are granted. And that means that almost 99 percent of the time the Government wins. Presumably Federal law enforcement officers, at least, have learned to adapt to the exclusionary rule.

All right, a final point. If I had to give one story, one anecdote that shows the need for the exclusionary rule, it would be this: I was on a panel almost 20 years ago in Minnesota where I was then teaching, and Minnesota admitted illegally seized evidence until *Mapp* required the contrary. The St. Paul Police sent us a spokesman to take—to give the police viewpoint at this panel—and the panel discussion was taped and it's been written up in the law reviews—and we made the point—those of us who favored the exclusionary rule—look, you guys are complaining that you can't arrest on suspicion any more and you can't round up people any more. You never could. It was always against the Constitution. It was against the Minnesota State constitution, as well as the Federal Constitution. All you are saying is that you have been violating the law all along, but up to now it didn't matter. And the St. Paul detective replied, "No, how can you say that. We told the courts how we got the evidence, we told them we broke in the doors, we told them sometimes we pried open windows, the judiciary OK'd it." They knew what the facts were and they OK'd it.

Now, there it is. The police officer doesn't understand how you can say that what he is doing is wrong if the courts let it in, if the courts OK it.

When Senator Kennedy wrote to me about 4 years ago, when he was then chairman of the Senate Judiciary Committee, to comment on the exclusionary rule, remembering this incident, and remembering the famous dissents of Holmes and Brandeis in the *Olmstead* case, I said in a letter to him that the exclusionary rule has a great symbolic significance, that it demonstrates to the general public and to law enforcement officers alike that the courts are sufficiently committed to the principles of the fourth amendment that when the police themselves break the law they and other agencies of Government will not be allowed to use the benefits which flow from the violation. Were it otherwise, the average citizen and the average police officer would have further reason to believe that our Government is pervaded by self-seeking hypocrites.

Other witnesses have mentioned Senator Harrison Williams. I didn't come here to discuss Senator Williams. But if you want to mention Senator Williams and analogize to Senator Williams, I remember the chairman of the relevant Senate committee saying that unless we exclude Williams from the Senate, we will lose our credibility. So, I say to you, that the Senator Williams story cuts two ways. I say to you that the public would have had some doubts about the credibility of the Senate. Moreover, let me just say that Senator Williams claims he was innocent on the merits. Let me say further, the courts did consider the possible illegality of the police, together with the merits. So, it is a question of how you analogize to the *Williams* case.

I told my anecdote about the St. Paul detective, but some would say, what is one anecdote worth? Well, since then, as Wayne LaFave mentioned in passing, since then a professor of police officers, at John Jay College, did a study of police attitudes about the exclusionary rule, what it means to them, how they perceive it. He interviewed 90 police commanders and he interviewed hundreds of police officers, including many of his own students. And he went on 40 tours of duty as an observer. And he said in the conclusion of his very recent study:

There is every indication that our police could not understand or respect a court which would abolish the exclusionary rule. At the very least the police would doubt the applicability of the fourth amendment standards, regardless of any direct sanctions that might be imposed; for the American constitutional tradition is such that our police have great difficulty believing that standards can have any real meaning if the Government can profit from violating them. And police doubts are likely to be stronger now than they would have been if the exclusionary rule had never been imposed in the first place. Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the 4th and 14th amendments, no matter what substitute remedies may be applied.

Well, there it is; confirmation, if you will, of the instincts of two of the greatest Justices ever to sit on the Supreme Court; Holmes and Brandeis.

Thank you.

Senator MATHIAS. Thank you, Professor Kamisar.

Judge Wilkey, I think you are entitled to your rebuttal time.

Judge WILKEY. Thank you, Mr. Chairman.

I made a few notes here while Professor Kamisar and the others were speaking. I would like to sort of assemble them and see if we

can put the issues in some order, the issues that I believe are concerning the committee, judging from the questions.

THE RULE IS A CHOSEN REMEDY, NOT A CONSTITUTIONAL MANDATE

First of all, as to constitutionality, I am not prepared to address that. It is not in my statement here precisely because I had felt that that issue was fairly well considered; that the exclusionary rule was a remedy to enforce, to make live a constitutional right; and that there was, as there is in most cases, a choice of remedies.

In support of the constitutionality of it though I would point out that for 125 years no one mentioned an exclusionary rule. The Republic and criminal prosecutions and searches, both with and without warrants, went on before *Weeks* for 125 years.

During that time, of course, we had the benefit of the Founding Fathers serving in Congress and on our courts. And also during a substantial portion of that time men in public life—in the judiciary and the legislature—were confidants of and had contact with the Founding Fathers.

But, no one thought about the exclusionary rule.

The Supreme Court has never stated that the exclusionary rule is compelled by the fourth amendment. In fact, several of the Justices have said precisely that it is not compelled by the fourth amendment.

I recall the statement that the chairman read from the *Mapp* case written by Justice Clark, which I understand gave you some concern, which indicated, perhaps inferentially, that this particular remedy was compelled by the fourth amendment. I would say that all Mr. Justice Clark meant was that it was the duty of the Court to make the fourth amendment effective.

And in that very same case Mr. Justice Black, who wrote the dissent, stated his understanding of what the holding of the Court was, and I quote:

The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.

Black said that in the very case where the chairman quoted Clark, which, of course, is subject to its own interpretation.

We have had actions by Congress in regard to the *Miranda* legislation, action by Congress in regard to the wiretap legislation, which indicates that Congress implementation of the fourth amendment protection is certainly well within its province.

In addition to Justice Black, I would add that the statements of those Justices who have been cited by others here today in the belief that they would sustain a good-faith exception, or wanted to modify, or repeal, or abolish the exclusionary rule, such as the Chief Justice and Justices Rehnquist, White, and Blackmun, and Powell, the tenor of their remarks, in cases and outside, indicate clearly that they do not regard the exclusionary remedy as mandated by the fourth amendment; that the remedy is a choice of remedies.

Also I recall Assistant Attorney Jensen's testimony last October or November before this committee, in which he outlined very

clearly the constitutional foundation on which any action by the Congress would rest.

ALTERNATIVE METHODS OF ENFORCING THE FOURTH AMENDMENT

Leaving the constitutional issue, one of the things that seems to be assumed is that there really are no alternatives to the exclusionary rule.

Of course, the most obvious answer to that is that the logical thing is to expect the executive branch to discipline and control its own employees within constitutional limits. And then if we have some doubts about our capacity to do that, I suggest that we look at the experience of other civilized countries. No other civilized country has a mandatory exclusionary rule in regard to searches and seizures.

Why is that?

ALTERNATIVE METHODS OF POLICE CONTROL IN OTHER COUNTRIES

As the small boy said while watching the parade: "Why is everyone out of step except my Uncle Sam?"

There are several other countries which have looked at the experience with our exclusionary rule and have rejected it. It is simply that they control their police through other measures.

The other countries have found perfectly workable ways to control the police. I feel as safe in Canada or in England as I do in the United States in regard to my civil liberties. And I think we would be hard put to argue that those Governments, and their judiciary, and their system affords less protection.

In the dialog between Professor Blakey and the chairman, the chairman quite properly remarked that it may not be a question of superiority; it may be a question of difference. I agree with that. But it is like a jury. If there is one holdout on the jury, the standard instruction by the judge is—not knowing who the juror is—to consider carefully the views of your colleagues on the jury. And I think we should consider carefully the experience and the rules in other civilized countries.

I think Israel is a good example. Israel has a common law tradition and has the same rule as in England and Canada, which is a very strict rule, the latest pronouncement on that in England being *The Queen v. Sang* in the year of 1979.

Israel has the common law tradition of England, but also has the heritage from all of the western democracies. And Israel very clearly has rejected the American exclusionary rule and adheres to the very strict English rule.

There is a recent article on that by Col. Straschnow of the Israeli Army in 93 Military Law Review 57 (1981); in which he explores and compares the Israeli rule with the American, and says they are diametrically opposed.

Professor KAMISAR. May I respond briefly to that, Senator?

First of all, I am not going to read you the language, but I would say and ask you and your staff to look at volume 367 U.S., which is the volume which contains *Mapp*, look at pages 648, 657, and 660. I would say the language there seems to say that the exclusionary rule is compelled by the Constitution.

Tom Clark says: Our decision founded on reason and truth gives to the individual no more than that which the Constitution guarantees him, et cetera. And Harlan, dissenting in *Mapp*, says on page 678: Essential to the majority's argument against *Wolf* is the proposition that the Federal exclusionary rule derived not from the supervisory power of the court over the Federal judicial system, but from constitutional requirement. This is so because no one, I suppose, would suggest that this court possesses any general supervisory powers over the State courts.

As for the argument where was the exclusionary rule all these years until 1914, first of all, the Supreme Court——

Judge WILKEY. Just a minute.

Mr. Chairman, I had not concluded my remarks.

Professor KAMISAR. Well, I am responding to that point.

Judge WILKEY. And I did not respond point by point to what Professor Kamisar was saying.

Senator MATHIAS. We will ask Professor Kamisar to suspend.

Judge WILKEY. On the question of what is in *Mapp*, I am sure this committee can read *Mapp*. I merely called the chairman's attention to the fact that Black categorically stated that it was not compelled by the fourth amendment, using that same case.

And I would adhere to what Professor Blakey said; that this committee should not hesitate to do what it thinks right and within the Constitution just because some law professors can come before the committee and point to certain paragraphs in some of the many decision that have come down and raise some doubt about it.

As the chairman says, the committee will do what it thinks is right.

DETERRENCE: HOW MUCH IS OBTAINED? HOW MUCH IS NEEDED TO JUSTIFY COSTS OF THE RULE?

Now, as to the question, Does the rule deter? I think Mr. Justice Blackmun answered that in *Janis* when he said in a very full statement that no one knows, in effect. No one knows. There is no proof.

Chief Justice Burger in *Bivens* went further than that. He said not only does no one know, there is no proof, but by the very nature of the kind of statistics and the kind of empirical data that we have to rely on, possibly no one can know.

There is another question. How much deterrence, if there is some deterrence, and obviously there is some, but how much deterrence will be sufficient to outweigh the unquestioned cost of using the exclusionary rule as the only device to enforce the fourth amendment?

I remember out at the hearing before the task force, in which Professor Kamisar and I participated, one of the members asked me: After the Salk vaccine, with the greatest reduction in this disease that one could imagine, would you not say that the Salk vaccine has been effective? And I said: Yes, the Salk vaccine has been effective, but that does not prove two things:

One, it does not establish that there are no alternatives to the Salk vaccine. It does not prove that there may not be alternatives even better than the Salk vaccine for effectiveness.

Second, if the Salk vaccine had been effective in suppressing polio, but the incidents of cancer patients among those taking the vaccine were five times the normal rate in that age and occupational group, I think we would have serious concern about possible side effects of the vaccine and be looking for other remedies for polio.

COSTS: UNDENIED AND UNDENIABLE

What are the costs of the exclusionary rule?

I have listed these on pages 8 and 9 of my prepared testimony. There are 12 of them. The first is the criminal goes free. But the other burdens are there too.

The interesting thing about this is that these costs are undeniable. No one disputes the existence of these costs of the exclusionary rule.

Mr. Justice Powell perhaps gave the most comprehensive list in *Stone v. Powell*. The other Supreme Court Justices, White, Blackmun, Chief Justice Burger, and Rehnquist, have listed the cost of the rule. No one denies that these costs exist.

BURDEN OF PROOF

So I would suggest to the committee that if we are to exclude probative, unquestioned, valid evidence, the burden of proof is on those who would exclude the evidence. And we must take into consideration the undeniable cost in evaluating any merit of deterrence, if that can be proved.

WHERE IS DETERRENCE WHEN A WARRANT IS INVOLVED?

Now, on warrants. Professor Kamisar and Senator Specter engaged in a dialog about that, asking questions and giving some examples.

One of the cases that comes to mind in regard to the wisdom of the exclusionary rule and warrants is, of course, *Coolidge v. New Hampshire*. There is a case where even the issuance of a warrant did not save the search as being legal. The official issuing the warrant had also some prosecutorial duties and the Supreme Court held that, therefore, it could not validly authorize the search and suppress the evidence.

Mr. Jensen gave considerable other testimony as to other cases and other circumstances. And I believe that Senator Specter mentioned some other cases in which the exclusion of the evidence has not come about because the constable blundered, but somewhere along the line there was a slip up in the interpretation of the law, the way the warrant was made out, et cetera.

Now, what deterrence can we have in a case like *Coolidge v. New Hampshire* where a warrant was issued but yet the evidence was excluded?

IMPACT ON THE COURTS

As to the impact on the courts, which was mentioned by Professor Kamisar. He cited the GAO study. I am glad he did because this illustrates the burden on the courts.

He mentioned the small percentage of cases declined by the prosecutor's office in that study because of the fourth amendment problems. That is true. But the paragraph above on page 1 of this study says: 33 percent of the defendants who went to trial filed fourth amendment suppression motions.

Now that is where the burden on the court is. Of the defendants going to trial, 33 percent filed suppression motions. It does not matter how the judge ruled in those motions. He had to rule. He had to study it. He had to make a decision. And my experience teaches me that almost every one of those fourth amendment suppression cases were probably appealed.

In our circuit we have 86 percent appealed in our criminal trials.

Then other data that Professor Kamisar should get familiar with in this study, which he has never mentioned in our several dialogs, is page 8 of the GAO study.

Senator MATHIAS. Judge, if I could interrupt you, that GAO study has been mentioned repeatedly during these hearings. I think I might take this opportunity to suggest that without objection we include that as a part of the record.

Judge WILKEY. Fine. I think it is helpful.

[The GAO study follows:]

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REPORT BY THE
Comptroller General
OF THE UNITED STATES

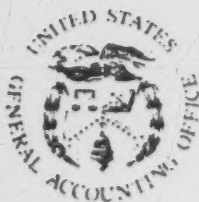
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Impact Of The Exclusionary Rule On Federal Criminal Prosecutions

At the request of Senator Edward M. Kennedy, GAO studied the impact of the exclusionary rule on criminal prosecutions. In general, this rule prohibits the introduction of evidence seized in violation of the fourth amendment "unreasonable searches and seizures."

Of the 2,804 cases analyzed during the period July 1 through August 31, 1978, 16 percent of the defendants whose cases were accepted for prosecution filed some type of suppression motion; 11 percent cited the fourth amendment. However, only four tenths of 1 percent of declined defendants' cases were declined due to fourth amendment search and seizure problems.



GGD 79 45
APRIL 19, 1979



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-171019

The Honorable Edward M. Kennedy
United States Senate

Dear Senator Kennedy:

Your letter dated December 8, 1977, requested us to develop empirical data on the impact of the exclusionary rule on criminal prosecutions. (See app. IV.) In general, this rule prohibits introduction of evidence seized in violation of the fourth amendment. (See app. I.) To accomplish this request, we analyzed 2,804 defendant cases handled from July 1 through August 31, 1978, in 38 U.S. attorneys' offices. Our methodology is discussed in appendix III.

The results of our study are summarized below and discussed in detail in appendix II.

- Sixteen percent of the defendants whose cases were accepted for prosecution filed some type of suppression motion.
- Eleven percent of the defendants whose cases were accepted for prosecution filed fourth amendment suppression motions.
- Thirty-three percent of the defendants who went to trial filed fourth amendment suppression motions; most defendants had formal hearings on their motions; however, the overwhelming majority of these motions were denied.
- Four-tenths of 1 percent of the declined defendants' cases were declined due to fourth amendment search and seizure problems.

The filing of fourth amendment suppression motions, even those not formally heard in court, requires expenditure of criminal justice system resources. However, on the basis of our study, the resources expended were modest when compared

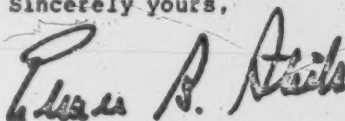
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with the total resources used in the criminal justice system. Fourth amendment motions, when granted in total or in part, did appear to reduce the likelihood of the defendant being convicted.

As arranged with your office, unless you publicly announce the contents earlier, we plan no further distribution of this report until 15 days from the date of the report. At that time we will send copies to interested parties and make copies available to others.

We trust the information provided will be useful to your continuing evaluation of the exclusionary rule.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Thomas B. Smith". The signature is fluid and cursive, with the first name "Thomas" and last name "Smith" clearly distinguishable.

Comptroller General
of the United States

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THE FOURTH AMENDMENT AND
THE EXCLUSIONARY RULE OF EVIDENCE

The fourth amendment to the Constitution of the United States protects the right of the people to be secure against arbitrary governmental interference with certain aspects of their privacy. The fourth amendment provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The fourth amendment protects against arbitrary governmental interference with privacy by prohibiting unreasonable searches and seizures and by requiring that warrants be based upon probable cause. The amendment does not specifically prohibit warrantless searches, but, with the exceptions outlined below, searches that are conducted without warrants generally are presumed to be illegal.

Warrantless searches have been upheld and characterized as reasonable in some narrowly defined circumstances. For example, a warrantless search conducted during a valid arrest and limited to the area where the arrestee might reach for a weapon or destroy evidence is lawful. A warrantless search is also valid if the subject knowingly and voluntarily consents to it. Another exception applies when a police officer reasonably concluding that a suspect may be armed and dangerous, conducts a "stop and frisk" body search.

Other exceptions apply when evidence is in an officer's plain view or if he comes upon the evidence lawfully in hot pursuit of a suspect. Warrantless searches or seizures in these situations, referred to as searches or seizures under "exigent circumstances," are considered lawful because

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the delay necessary to obtain warrants might result in bodily harm to the officers or to others and in the immediate removal or destruction of evidence.

Finally, the Supreme Court on occasion has upheld warrantless searches if the Congress specifically authorized the searches to carry out constitutionally valid regulatory schemes. But mere passage of such an authorization cannot suspend the protection of the fourth amendment. Whether conducted with or without a warrant, any governmental search must be constitutionally reasonable and, in making that determination, courts balance the need for the search against the invasion of privacy the search would entail.

The fourth amendment does not explicitly say what the consequences of a violation of the guarantee should be. In 1914, however, the Supreme Court decided the case of Weeks v. United States, 232 U.S. 383, and barred the use in Federal prosecutions of evidence obtained in violation of the fourth amendment. ^{1/} This prohibition, which is known as the exclusionary rule of evidence, was later expanded to not only bar the use of illegally seized evidence in court but to prohibit its use for any purpose (Silverthorne Lumber Co. v. United States, 257 U.S. 385 (1920)). Thus, if illegally seized evidence gave the Government knowledge or leads about the location, content, and types of additional evidence, the latter may be subject to the exclusionary rule as well. (Evidence in this category is called "fruit of the poisonous tree.")

There are several predominant justifications for the exclusionary rule. The first is based on the empirical proposition that the rule deters the police from violating the fourth amendment, lest they run the peril of losing cases when they obtain evidence illegally. The remaining and probably more important justifications rest on a series

^{1/}Mapp v. Ohio, 367 U.S. 643 (1961), applied the exclusionary rule to the States as a matter of Federal constitutional law.

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of principles: (1) when the police obtain evidence in violation of the Constitution, the courts must exclude it to avoid the taint of a partnership between official lawlessness and the judiciary, (2) illegally seized evidence must be excluded to assure the people that the Government cannot profit from its lawless acts, and (3) if illegally seized evidence could be used to secure convictions, the Government's role as lawbreaker would breed general contempt for the law. 1/

Critics of the exclusionary rule question this rationale. They point to the lack of empirical data showing that police will not obtain evidence illegally if such evidence would not be admissible during a trial. They explain that certain applications of the exclusionary rule exclude evidence seized under circumstances when the police acted in good faith and without knowledge that the seizure would later be found illegal. Still others question the societal cost of the rule and note that illegally seized evidence is often the most probative and reliable information bearing on the guilt or innocence of the accused. These critics believe that when such evidence is excluded, the truth-finding process is deflected and some factually guilty individuals may go free.

1/Confessions obtained in violation of the fifth amendment to the Constitution cannot be used in criminal prosecutions. The fifth amendment prohibits compelling a person to be a witness against himself in any criminal case. Unlike illegal searches and seizures, when physical evidence is excluded for reasons generally unrelated to its reliability as evidence, the rationale for excluding unconstitutionally obtained confessions is based, in part, on the inherent untrustworthiness of coerced or involuntary statements. But like the rationale for applying the exclusionary rule to illegally seized evidence, the justification for excluding illegally obtained confessions also stems from the principle that the police should obey the law while enforcing the law and that life and liberty can be as much endangered by illegal methods of obtaining confessions as it can from illegal evidence-gathering procedures.

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ISSUANCE OF WARRANTS AND MOTIONS TO SUPPRESS

Searches and seizures fall into one of two categories: those made with warrants and those made without warrants. To obtain a warrant, law enforcement officials appear at an ex parte hearing before a magistrate or other appropriate judicial officer (usually a district court judge), who may grant or deny the request. In reaching this decision, the judicial officer determines, among other matters, whether probable cause exists to establish the validity of the request.

While searches made with warrants ordinarily are considered presumptively valid, subject to rebuttal by the defense, the fact that warrants were issued does not provide absolute certainty that the searches will be constitutionally valid. The following list provides examples of the circumstances for both warrant and warrantless situations that may give rise to illegal searches and seizures and the exclusion of evidence under the exclusionary rule.

Searches conducted with warrants

- Probable cause supporting the warrant not strong enough.
- Informant providing information supporting the warrant not considered reliable.
- Information on which warrant was issued was incomplete, inaccurate, or misleading.

Searches conducted without warrants

- Search performed incident to arrest but invalid because search covered too broad an area.
- Search too remote in time from arrest.

If the defendant believes all or a part of the prosecution's case is supported by evidence seized in violation of the fourth amendment, he may file a motion to suppress the evidence. He must then demonstrate to the court that he or an area in which he had a legitimate expectation of privacy was the subject of a search and that the search was conducted or evidence seized in violation of the fourth amendment. In certain situations involving

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warrantless searches, the prosecution may be called upon to carry the burden of convincing the court of the search's or seizure's validity.

Regardless of whether the defendant's motion is denied or sustained in total or in part, the trial may be conducted if the arrest was valid and the court's decision on the motion may be appealed to the U.S. Court of Appeals. The Court of Appeals may rule on the motion and, if the defendant was convicted, the conviction may be reversed or sustained or a new trial may be ordered.

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RESULTS OF ANALYSIS OF
THE IMPACT OF THE
EXCLUSIONARY RULE ON
CRIMINAL PROSECUTIONS

Senator Edward M. Kennedy asked us to develop empirical data on the impact of the exclusionary rule ^{1/} on criminal prosecutions. (See app. IV.) To do this we selected a national sample of 42 U.S. attorneys offices. Because of the varying caseloads in each office, we stratified the offices into four groups of defendants handled (1,000 and over, 500 to 999, 300 to 499, and fewer than 300). The individual defendant was used as the sampling unit, and our sample covered the period July 1 through August 31, 1978. The defendants were subdivided into two groups (1) those whose cases had been formally accepted for prosecution at any time in the past but had been closed (terminated) during the sample period and (2) those whose cases had been formally submitted to the U.S. attorney's office which required decisions to prosecute or not prosecute (case screening).

We sent questionnaires to personnel in U.S. attorneys offices responsible for the cases. The questionnaire asked about the role potential fourth amendment problems played in (1) decisions to prosecute or not to prosecute, (2) the frequency with which all types of suppression motions were filed on defendants accepted for prosecution, (3) the frequency with which fourth amendment motions were filed, (4) the extent to which fourth amendment motions were involved in cases which went to trial, and (5) the impact of fourth amendment motions on both the criminal justice system resources and the disposition of defendants. A complete discussion of our review methodology is contained in appendix III.

1/Barring the use in Federal prosecutions of evidence obtained in violation of the fourth amendment.

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TYPES OF DEFENDANTS AND CRIMES
PROSECUTED BY U.S. ATTORNEYS

A substantial number of defendants prosecuted by U.S. attorneys have had previous felony convictions. An estimated 40 percent of the defendants we sampled had prior felony convictions, and about 28 percent had been incarcerated as a result of these convictions.

While seizure of evidence can occur in the development of any criminal case, U.S. attorney office officials stated there were 15 offenses in connection with evidentiary motions which were most likely to be filed. These include firearm, immigration, and narcotics violations. The types of crimes prosecuted by U.S. attorneys offices vary considerably. For example, in the largest offices sampled, an estimated 88 percent of the defendants, in cases accepted for prosecution, were accused of crimes where the seized evidence would be most susceptible to search and seizure challenge. This compared with a low of 69 percent in the small offices sampled. The following table illustrates this point.

<u>Type of crime</u>	<u>U.S. attorney's office size</u>			
	<u>Very large</u>	<u>Large</u>	<u>Small</u>	<u>Very small</u>
	----- (percent) -----			
highly susceptible violations:				
Firearms	5	10	13	10
Narcotics	29	11	7	5
Immigration	18	1	3	2
Other highly susceptible violations	36	52	46	57
Total	88	74	69	74
Other violations susceptible	12	26	31	26
Total	100	100	100	100
Number of defendants	1,661	783	230	123

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Question: In what percentage of criminal trials are suppression hearings held?

So as to not unduly burden the U.S. attorneys, we did not attempt to determine for all suppression motions when formal suppression hearings had been held. This question was answered only for fourth amendment motions. The following discussion concerns suppression motions filed.

About 16 percent of the defendants whose cases were closed during our sample period filed suppression motions. As shown below, 55 percent of the motions related to searches and seizures allegedly conducted in violation of the fourth amendment.

<u>Type of suppression motion filed</u>	<u>Percent of defendants filing motions (note a)</u>	<u>Percent of all motions</u>
General fourth amendment search/seizure	10.5	55.3
Electronic surveillance (court ordered)	0.4	1.9
Electronic surveillance (consensual)	0.5	2.9
Confession	4.4	23.2
Photographic identification	0.9	4.6
Lineup identification	0.1	0.6
Other	2.2	11.5

a/The same defendant may have filed several different motions.

Analysis shows that suppression motions tend to be filed more frequently in larger U.S. attorneys offices (19.3 percent of the defendants) than in small ones (6.5 percent). In addition, cases that go to trial are more likely to involve defendants who have filed suppression motions than cases that do not go to trial. A comparison of total defendants with those who go to trial is shown on the following page.

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Office sizeTotal defendants
filing motionsDefendants going to
trial filing motions

----- (perce. t) -----

Very large	19.3	41.1
Large	16.1	49.7
Small	6.5	29.2
Very small	11.3	31.3
National estimate	16.0	43.0

Question: In what percentage of criminal trials are suppression hearings held based on fourth amendment violations and in what percentage of these hearings is the evidence suppressed?

Analysis shows that search and seizure was an element in about 30 percent of the cases closed during our sample period. Very large offices tend to prosecute more defendants who were subjected to search and seizure.

The table below shows that even when search and seizure was an element in a case, less than half the defendants requested evidence suppression on fourth amendment grounds.

Percent of Defendants Involved
in Search and Seizure

	<u>U.S. attorney's office size</u>				<u>National estimate</u>
	<u>Very large</u>	<u>Large</u>	<u>Small</u>	<u>Very small</u>	
No search/ seizure	<u>60.5</u>	<u>75.9</u>	<u>78.3</u>	<u>76.7</u>	<u>70.2</u>
Search/seizure with no fourth amend- ment motion	26.2	13.4	16.5	17.7	19.3
Search/seizure with a fourth amendment motion	<u>13.3</u>	<u>10.7</u>	<u>5.2</u>	<u>5.6</u>	<u>10.5</u>
Total	<u>39.5</u>	<u>24.1</u>	<u>21.7</u>	<u>23.3</u>	<u>29.8</u>
Total	<u>100</u>	<u>100</u>	<u>100</u>	<u>100</u>	<u>100</u>

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Even when motions were filed, the vast majority either were decided in favor of the Government or not heard. In only a few instances were the motions granted in total or in part. ^{1/} The following table shows for all defendants filing a fourth amendment motion the disposition of the motion by very large and large U.S. attorneys offices. ^{2/}

<u>Disposition of fourth amendment motions</u>	<u>U.S. attorney's office size</u>	
	<u>Very large</u>	<u>Large</u>
	----- (percent) -----	
Motion denied in total	54.3	81.2
" granted in total	2.7	3.5
Motion granted in part	12.2	5.9
Other (includes not heard)	30.8	9.4
Number of defendants	221	85

As the table indicates, if a fourth amendment motion was filed, the issue was likely to be decided in a formal hearing. For example, 70 percent of the defendants in very large offices and 91 percent in large offices received formal hearings.

Of the cases closed during our sample period, only 14.6 percent were closed through the trial process. An estimated 32.6 percent of the defendants in the cases that went to trial filed fourth amendment motions; nearly all were decided by formal hearings. Motions of defendants, who go to trial and have a formal evidence suppression hearing, are almost always denied; the denial rates for very large and large U.S. attorneys offices were 80 and 90 percent, respectively.

^{1/}When motions are granted in part, the court has ruled that some of the evidence was illegally seized or was discovered as a result of an illegal search or a seizure and cannot be used by the prosecutor.

^{2/}Too few motions were filed in the smaller offices to develop reliable statistics.

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Overall, in only 1.3 percent of the 2,804 defendant cases was evidence excluded as a result of filing a fourth amendment motion.

Question: In what percentage of the fourth amendment hearings were the law enforcement agents acting with warrant;?

The use of warrants in those fourth amendment cases that resulted in formal hearings varied greatly. Warrants (search and/or seizure) were used about 35 percent of the time in very large offices as opposed to 70 percent of the time in large offices. We did not develop any information to explain this difference. Data was not sufficient in the smaller offices to provide a detailed statistical analysis.

Question: How much in-court time was required to decide the suppression motions?

When a motion is filed, the U.S. attorney must prepare to respond to the motion if it is heard. When the motion is heard, more time is required not only by the U.S. attorney but by others, such as judges, court officials, and law enforcement officials. We asked the U.S. attorneys for data on:

- The time they spent preparing to answer motions.
- The court time required to hear them.
- The number and types of people required to attend the hearings.

This data was used to develop the following national estimates of the resources devoted to responding to and participating in fourth amendment hearings during our sample period.

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<u>Resources involved</u>	<u>Estimated staff-years</u> (<u>note a</u>)
U.S. attorney (preparation and in-court time)	3.6
Judges	0.9
Other court officials	3.2
Federal law enforcement officials	2.4
State/local law enforcement officials	1.1
Others	1.2
Total	<u>12.4</u>

a/These estimates do not include out-of-court preparation time that may have been necessary for other parties. We only estimated preparation time for the U.S. attorneys.

During our sample period, the U.S. attorneys offices had about 271 available staff-years ¹/ to devote to case prosecution. Thus about 1.3 percent ($3.6 \div 271$) of the available time was devoted to fourth amendment motions. This estimate is low as certain amounts of time were used for such things as vacation and administrative activities, but we could not obtain information on time directly charged to the prosecutive effort.

Impact of fourth amendment suppression motions on defendant outcomes

As stated previously, while there are very few instances of evidence suppression, one of our objectives was to determine how important suppressed evidence may have been to the

¹/During fiscal year 1978, the U.S. attorneys offices had 1,628 full-time attorneys. Thus, during our 2-month sample period, about 271 staff-years ($1,628 \div 6$) would have been available.

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prosecution. Analysis shows that defendants in cases when evidence is suppressed are less likely to be convicted than in those when the motions are denied. The following table shows this impact.

Case outcome	Motion outcome			
	Granted in total Very large office	or in part Large office	Denied in total Very large office	Large office
	----- (percent) -----			
Dismissed/not guilty	45.5	50.0	15.9	15.4
Convicted	54.4	50.0	84.1	84.6
Number of defendants	33.0	8.0	113.0	65.0

While the table shows that a relationship does exist, we did not develop the data to evaluate why the evidence in some cases was suppressed. Further, there is no certain way of determining whether the inadmissibility of excluded evidence was the sole and exclusive proximate cause of an acquittal or dismissal.

DEFENDANT SCREENING

Fourth amendment motions are filed infrequently and evidence exclusion is rare. However, case screening by the U.S. attorneys might have caused the figures in the above discussion to be understated. Case screening is examining cases and deciding whether to prosecute the defendants. Department of Justice officials told us that cases involving illegal searches and seizures would probably not be prosecuted. The following section examines the screening process and its fourth amendment implications.

During our sample period, the U.S. attorneys screened about 9,400 potential felony violations, of which 54 percent were accepted for prosecution. About 15 percent of the defendants' cases screened involved search and seizure with considerable variation by office size as indicated on the following page.

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<u>Office size</u>	<u>Percent of defendants involved in search/seizure</u>
Very large	22.5
Large	17.2
Small	5.1
Very small	10.1
National estimate	14.7

For those cases that were declined, about 6.3 percent involved search and seizure. But for those involving search and seizure that were declined, the U.S. attorneys indicated that search and seizure problems were the primary reason for declining only 6.3 percent of the cases. Thus, search/seizure problems are indicated as the primary declination reason in only about 0.4 percent of the total declined cases.

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REVIEW METHODOLOGY

Because our objective was to develop information about motions in general and fourth amendment motions specifically which would enable national estimates to be made, we had to draw a national probability sample of U.S. attorneys offices. Because 95 U.S. attorneys offices are involved, we developed questionnaires and selected 42 U.S. attorneys offices to complete them. Our review methods are discussed below in terms of the

- sampling plan,
- questionnaire design,
- questionnaire application, and
- data base computerization.

SAMPLING PLAN

The 88 continental U.S. attorneys offices were first stratified into these four groups (strata) based on the number of defendants handled in fiscal year 1977: (1) 1,000 defendants and over, (2) 500 to 999, (3) 300 to 499, and (4) fewer than 300. The following table shows the strata, the universe sizes, and the sample sizes that would enable national estimates to be made. The offices within each strata were selected randomly.

<u>Strata</u>	<u>Universe size</u>	<u>Sample size</u>
1,000 and over	14	14
500 to 999	24	12
300 to 499	17	8
Fewer than 300	33	8
Total	88	42

This sampling procedure is called a stratified cluster sample.

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Since only 38 of the 42 sampled offices responded to our questionnaire, we had to adjust the universe and sample sizes to reflect the estimated number of offices that would have responded if questionnaires had been sent to all 88. The following table shows the strata, the adjusted universe size, and the adjusted sample size.

<u>Strata</u>	<u>Universe size</u>	<u>Sample size</u>
1,000 and over	13	13
500 to 999	22	11
300 to 499	15	7
Fewer than 300	<u>29</u>	<u>7</u>
Total	<u>79</u>	<u>38</u>

QUESTIONNAIRE DESIGN

Because there was no national system containing the data required to respond to the request, we developed a national data collection and reporting system. The heart of this system was two special data collection instruments (screener's log and fourth amendment motion questionnaire).

Design constraints

The design effort had certain constraints.

First, because of the number of locations in our sample, we had to rely on the U.S. attorneys offices' personnel to fill out the questionnaires. Because of their heavy workloads our questionnaires had to be short and easy to complete.

A second major constraint was the need for timely response to the questionnaire. This meant that the time period for collecting the data had to be held to a minimum. After reviewing annual average caseloads for U.S. attorneys offices, we concluded that collection of data for a 2-month period would allow us to present our results in terms of

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national estimates. We chose the period July 1 through August 31, 1978. While we recognized we would encounter seasonal variations because of summer vacations of prosecutors and court officials, we did not believe these would materially affect our results.

Unit analysis

The next step in the design process was to determine the most useful unit of analysis. We believed that the questionnaire could be answered in terms of either Federal criminal cases or individual Federal case defendants. The selection of the unit of analysis was important because one case might have many defendants (one or more of which might file motions) and another case might have a single defendant. Because individual defendants file motions to suppress evidence, we concluded that the most appropriate unit of analysis would be the individual defendant.

The need for two questionnaires

Originally we thought we would need information only on cases closed during our sample period. However, Justice Department officials warned us that some cases involving fourth amendment violations might never reach the U.S. attorney case stage because (1) the law enforcement agencies making the arrests, either independently or in conjunction with U.S. attorneys offices, might determine that search and seizure was not proper and decide not to forward the cases officially or (2) the cases, when presented to U.S. attorneys offices, might be evaluated (screened) and found to have a high potential for having fourth amendment problems and be declined for prosecution.

Identifying those cases dropped by law enforcement agencies before presentation to the Justice Department was not attempted because the primary thrust of the request was determination of the impact of the exclusionary rule on criminal prosecution. Therefore, we limited our work to analyzing the cases processed through U.S. attorneys offices.

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This approach, while missing the impact of potential motions viewed by the arresting organizations, provided information about how the formal screening process reacts to cases with suppression motion potential. By collecting information on closed cases, we measured the impact of motions on the entire prosecution process.

The screened and closed cases are not the same. Those being screened are merely being considered for prosecution; some will not be closed for many months or perhaps years. Closed cases are those which have gone through the entire process. Therefore, the two groups may come from different time periods; however, we believed that we could use them to obtain an overview of the process.

Separate forms were designed to collect data at each of the two stages in the process. We refer to the former as the "screener's log" and the latter as the "fourth amendment motion questionnaire." The forms are described below and appear as appendixes V and VI, respectively.

Screener's log

The screener's log was completed by U.S. attorneys for individual defendants in proposed felony cases. It was completed at the point in the system when a U.S. attorney's office reviews a case and either accepts or rejects it for prosecution. Its purpose was to yield data on the impact of the fourth amendment in decisions relating to which cases are to be prosecuted. The U.S. attorneys were asked to record data only for cases formally entered into the system. No telephone advice or recommendations made to Federal law enforcement agencies were to be recorded.

The log was designed to provide data on:

- The number of potential defendants involved.
- The history of past felony convictions.

APPENDIX III

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- The arresting agencies.
- The types of crimes involved.
- Whether or not search/seizure was involved.
- Types of warrants, if any, issued.
- An estimate of the probability that fourth amendment suppression motions would be filed.
- Whether the cases were accepted.
- If applicable, the primary reasons for declining the cases.

Fourth amendment motion questionnaire

The questionnaire on defendant motions was more complex than the screener's log. The U.S. attorneys were asked to complete it at the time they prepared closing memorandums on felony cases. The added complexity of the instrument stemmed from the fact that there were more possible outcomes in the various stages of prosecution once cases entered the system.

Basic data (similar to the screener's log) was requested for each defendant. If the case involved a fourth amendment suppression motion, additional information was requested. The questionnaire collected much the same data as the screener's log; it also gave us information concerning:

- What case dispositions had been.
- The extent to which any suppression motions had actually been filed and their number.
- Fourth amendment motions and their outcomes.
- The types of evidence involved.
- The reasons given for granting the motions in both warrant and warrantless cases.

APPENDIX III

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--The extent to which multiple motions and multiple searches had been involved.

--The amount of time and the number of people involved in the motion process.

Throughout the instrument design process, constant contact was maintained with the Department of Justice. The Office for Improvements in the Administration of Justice commented on each major revision of both instruments up to and including the final versions.

The log and the questionnaire were pretested on actual cases before mailing. Additionally, visits were made to the U.S. attorneys offices in Washington, D.C.; Richmond, Va; and San Diego, Calif., to obtain comments on the final drafts. These comments were included in the final questionnaire design.

U.S. attorneys were requested to give special attention to multiple defendant cases in estimating the time spent on motions. Specifically they were asked to distribute proportionately for each defendant both (1) the time spent preparing for the suppression motion hearing and (2) the time spent in the hearing. For example, if a case involved five defendants and 10 hours were spent preparing for a hearing and 5 hours were spent in the hearing, then 2 hours were to be entered for preparation time and 1 hour for actual hearing time on each of the five defendant questionnaires. The reason for this was to keep from overcounting the time required to prepare for and hear suppression motions.

QUESTIONNAIRE APPLICATION

By letter dated June 16, 1978, we explained to each U.S. attorney selected how the review would be conducted and the role of each U.S. attorney's office. Shortly afterwards, packages containing copies of both forms were mailed to each office. Each questionnaire and log carried a unique office-identifier so that completed forms could easily be matched with the responding office.

APPENDIX III

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After allowing sufficient time for delivery, we contacted each U.S. attorney's office to assure that the materials had been received and to answer any questions. We monitored the effort at each office until completed.

U.S. attorneys were extremely cooperative. We received completed forms from 38 of the 42 offices sampled. This response rate was sufficiently high to allow us to maintain an acceptable degree of reliability.

However, no data was obtained from four offices because:

- Completed logs and questionnaires from one office were lost in the mail. All attempts to trace the registered package failed. We believed that an excessive burden would be placed on the office if we requested the reconstruction of the completed questionnaires.
- One office refused to complete the questionnaire because it believed this would overburden its resources.
- Two offices, although pledging support or cooperation, failed to supply any usable data before our cutoff date.

DATA BASE COMPUTERIZATION

All logs and questionnaires were coded so that keypunching could be done directly from the completed forms. Before and after the keypunched data was computerized, standard verification procedures were used to assure accuracy. The major verification procedures were:

- All forms were reviewed for completeness and accuracy. Five percent of the computerized data file was verified back to the original forms.
- Output of the raw data was examined for obvious errors, and relationships between key questions were checked for consistency.
- Automated computer data checks (edit routine) were run.

APPENDIX IV

APPENDIX IV

EDWARD M. KENNEDY
MASSACHUSETTS

United States Senate

WASHINGTON, D.C. 20540

December 8, 1977

Mr. Elmer Staats
Comptroller General
General Accounting Office
441 G Street, N.W.
Washington, D.C. 20001

Dear Mr. Staats:

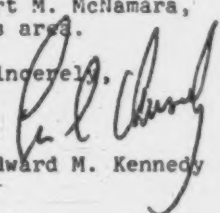
For the past couple of months, my staff and I have been engaged in research on the effect of the Exclusionary Rule on criminal prosecutions. The Rule prohibits the introduction of evidence seized in violation of the Fourth Amendment, and results generally in the termination of the pending criminal case.

We are attempting to fashion a legislative alternative to the Rule in certain well-defined situations. The success of our work is seriously hampered by the lack of empirical data about the effect of the Rule on criminal trials. We have attempted to obtain this information from the Department of Justice, but the Department has informed us that neither it nor the offices of United States Attorneys throughout the country collect such information.

My staff has met informally with members of your General Government Division staff to discuss the feasibility of a study which would collect the necessary data. The general impression was that such a study was possible, but that certain problems, such as instrument design, population designation and case sampling, would have to be resolved. My understanding is that a preliminary survey would be necessary before a final decision on the feasibility of a large-scale survey could be made. I would like GAO to undertake this preliminary study as well as the large-scale survey, should it be feasible.

The Exclusionary Rule is an important area of concern to me, especially since it impacts critically on the daily operations of the criminal justice system. If my staff can be of any assistance to you or your staff, please feel free to contact Robert M. McNamara, at 224-7488, who is assisting me in this area.

Sincerely,


Edward M. Kennedy

APPENDIX VI

APPENDIX VI

Signal of U.S. ATTORNEY
 WITH SUBSEQUENT NUMBER

Office Identifier: 01
 (1-2)

Year of Filing (3-4)	Case Number (5-11)	Defendant Number (12-13)

Short Case Number

NOTE: Add zeros in front of all numbers. For example, Case Number 310 would be entered as 000310, and then the first defendant would be entered as 001.

1. Past criminal felony convictions?
 (Check one.) (14)

1. ☐ Federal
 2. ☐ Non-Federal
 3. ☐ Both
 4. ☐ None
 5. ☐ Unknown

2. Past incarceration for felony convictions?
 (Check one.) (15)

1. ☐ Yes
 2. ☐ No
 3. ☐ Unknown

3. Arresting and investigating agencies

a. Arresting agency? (Check all that apply.)

- ☐ FBI (16)
☐ DAA (17)
☐ ATF (18)
☐ Secret Service (19)
☐ Postal Service (inspectors) (20)
☐ State or local (21)
☐ Other (Please specify) _____ (22)

b. Investigating agency? (Check all that apply.)

- ☐ FBI (23)
☐ DAA (24)
☐ ATF (25)
☐ Secret Service (26)
☐ Postal Service (inspectors) (27)
☐ State or local (28)
☐ Other (Please specify) _____ (29)

4. Crime type -- maximum penalty charged (Federal).
 (Check one.) (31-32)

01. ☐ Robbery
 02. ☐ Bank fraud and embezzlement
 03. ☐ Fire arms violations
 04. ☐ RICO -- Racketeer Influence
 Corrupt organizations
 05. ☐ Controlled substances -- narcotics
 06. ☐ Counterfeiting and forgery
 07. ☐ Crimes affecting the mails
 (including mail fraud)
 08. ☐ Fraud against the government
 09. ☐ Immigration
 10. ☐ Income tax
 11. ☐ Homicide or kidnapping
 12. ☐ Motor vehicle control -- ITW --
 Interstate Transportation of Motor
 Vehicles
 13. ☐ ITSP -- Interstate Transportation of
 Stolen property
 14. ☐ Gasoline/taxing
 15. ☐ Theft of Government property
 16. ☐ Other (Please specify) _____

5. What was the outcome of the case? (Check one.) (33)

1. ☐ Case dismissed
 2. ☐ Fled to maximum penalty charge
 3. ☐ Fled to lesser charge
 4. ☐ Trial, convicted on maximum penalty
 charge
 5. ☐ Trial, convicted on lesser charge
 6. ☐ Trial, not guilty
 7. ☐ Other (Please specify) _____

6. Was there a search/seizure involved in the
 case? (Check one.) (34)

1. ☐ Yes
 2. ☐ No
 3. ☐ Unknown

APPENDIX VI

12. What was the ultimate outcome of the suppression action(s) (including appeal disposition)? (Check one.)

1. ☒ Search warrant
2. ☐ Arrest warrant
3. ☐ Both
4. ☐ None

15.54

1. ☐ All motions granted in total
2. ☐ All motions denied in total
3. ☐ Some granted, some denied
4. ☐ Other (Please specify) _____

8. were any of the following suppression actions filed? (Check all that apply.)

- | | | |
|--------------------------|--|------|
| ☐ | 4th Amendment Search/Seizure | (36) |
| ☐ | Electronic surveillance (court orders) | (39) |
| ☐ | Electronic surveillance (consensual) | (40) |
| ☐ | Embezzlement | (41) |
| ☐ | Fraud I.D. | (42) |
| ☐ | Line-up | (43) |
| ☐ | Other (Please specify) _____ | (44) |
| ☐ | _____ | |
| ☐ | Other | (45) |

9. ☐ Not heard -- If not heard ship to
station 15.

13. What evidence types were suppressed or not suppressed as a result of the suppression hearings? (Check one box for each row.)

NOTE: IF YOU DID NOT CHECK THE 4TH AMENDMENT SEARCH/SEIZURE RESPONSE, TERMINATE -- ANSWER NO FURTHER QUESTIONS. OTHERWISE, CONTINUE.

9. How many 4th Amendment suppression motions were filed? (Check one.)

1. 1 1 action
2. 2 2 actions
3. 3 3 actions
4. 4 More than 3 actions

18. How many searches were covered in the suppression notice(s)? (Check one.)

1. ☐ 1 search
2. ☐ 2 searches
3. ☐ 3 searches
4. ☐ More than 3 searches
5. ☐ Unknown

11. Where was the search(es) covered by the suppression action conducted? (Check all that apply.)

- | | |
|-----------|------|
| Business | (40) |
| Residence | (49) |
| Room | (50) |
| Vehicle | (51) |
| Other | (52) |

	U S P P H E N E D	R O T	S U T	
3100000 17230	(1)	(2)	(3)	
Controlling substances				(56)
Drug paraphernalia				(57)
Drug manufacturing equipment				(58)
Haspines				(59)
Insulators of crime				(60)
Tools of crime				(61)
Other (specify) _____				(62)

Other (specify) _____				(63)

Other (specify) _____				(64)

NOTE: IF THE SEARCH/SEIZURE MOTION(S) WAS
DENIED IN TOTAL, SKIP TO QUESTION 121

APPENDIX VI

18. With respect to each search please indicate why the action was granted, using section (A) for searches pursuant to warrants and section (B) for warrantless searches.

4. Searches pursuant to warrant (check all that apply.)

SEARCH	SEARCH	SEARCH
Supporting affidavit insufficient as to facts of crime		
Supporting affidavit insufficient as to reliability of informant		
Supporting affidavit otherwise insufficient (e.g., failure to specify items to be searched or items to be seized)		
SEARCH BEYOND WARRANT SCOPE		
Technical defect in warrant/rescission/return		
Other (specify) _____		

8. Warrantless searches (Check all that apply.)

	SEARCH	SEARCH
<u>INDEX</u>	<u>1</u>	<u>2</u>
Search incident to <u>lawful arrest/alien</u>		
Search incident to <u>arrest/alien too broad</u>		
Search incident to - <u>arrest/alien</u> too remote <u>in time</u>		
Insufficient probable cause for search		
Search made when there was time to obtain warrant		
Consent given but not valid		
Other (specify) _____		

15. Overall, what impact did the suppression motion have on the case outcome?
(check one.)

(99)

1. ☐ No impact
2. ☐ Minor impact
3. ☐ Moderate impact
4. ☐ Major impact

16. Approximately how much extra time (excluding the time in court) did you spend on the case because of the suppression motion? (Please fill in the boxes -- round all fractional parts of hours to the nearest whole hour.

 $(\dot{y}_2 = y_0)$

17. Approximately how long did you spend in the suppression hearing(s)? (Please fill in the boxes -- round all fractional parts of hours to the nearest whole hour.)

(40%~50%)

10. How many of each of the following are you
were at, or requires to be available at the
suppression hearing(s)? (Please fill in
the boxes -- include those waiting, but
not called.)

- | | | |
|-----|--|-----------|
| ✓✓✓ | Judges and Magistrates | (90-99) |
| ✓✓✓ | Other court officials (law clerks, marshals, court reporters, probation officer, etc. -- count yourself) | (100-141) |
| ✓✓✓ | General law enforcement officials | (102-103) |
| ✓✓✓ | State and local law enforcement officials | (104-105) |
| ✓✓✓ | Other individuals including witnesses or secondary parties | (106-107) |
| ✓✓✓ | Defendant(s) and attorney(s) | (108-109) |

APPENDIX VI

APPENDIX VI

19. N/TB: Answer only for those cases where evidence was excluded.

20. Additional comments.

(111)

Was the law enforcement (FFI-10) following established agency procedure/policy when the evidence was seized? (Check one.)

(TMB)

1. ☐ No If either "No" or "No basis to judge" -- skip to question 20.
2. ☐ No basis to judge
3. ☐ Yes - oral If yes, briefly describe: (1) the defense contention; and, (2) the applicable agency procedure/policy.
4. ☐ Yes - written
5. ☐ Yes - both oral and written

(1) Defense contention: _____

(2) Agency procedure/policy: _____

Page 4

(18157)

Judge WILKEY. On page 8 of the GAO study, I want to call attention to this one place and let it go at that.

On the type of suppression motions filed, we must add search and seizure and electronic surveillance motions as both are fourth amendment; 55 percent for search and seizure, plus another percentage for electronic surveillance, which is also fourth amendment, add up to 60 percent. Of all motions filed sixty percent deal with the fourth amendment.

And I may say that this matter of cost—I don't want to let this go by—the impact on courts, is treated on page 14 and 16 of my testimony in detail.

That indicates where the burden on the trial courts and the appellate court is; no other issue comes up as frequently as the fourth amendment.

THE "GOOD FAITH" EXCEPTION

Now as to "good faith," which is treated on page 35 and 36 of my testimony.

On "good faith," this will take care of the first cost that I have listed here on pages 8 and 9 of my outline to my testimony will be taken care of. The "good faith" exception will prevent the obviously guilty heroin pusher, carrier of the illegal gun, transporter of policy slips it will prevent him from going free.

But look at the other costs there. There are 11 other costs which will be preserved by the "good faith" exception.

If you have a "good faith" exception, you have a "bad-faith" case by implication, where there must be an exclusion of the evidence.

The question will arise, as it does now. The question will come before the trial court with a different line to be drawn. But the trial court will still be called upon to draw the line between "good faith" and "bad faith." All of these other evils will be preserved.

As I think one of the others suggested, the temptation of the officer to twist his testimony, the temptation of the judge to indulge in a little hypocrisy and believe the officer in preference to the accused, will be even accentuated.

And in addition to those costs which I have listed here, these other 11 costs, there will be 2 more.

One is we put a premium on ignorance. The noble savage will be the ideal police recruit, the one who knows nothing of the Constitution. He can claim "good faith" errors.

Then, second, in addition, you will have enshrined the exclusionary rule in our jurisprudence, while there is now some hope of adopting a reasonable, effective and logical alternative instead of the exclusionary rule.

ESSENTIAL ELEMENTS IN ANY REFORM LEGISLATION

Well, let me conclude by saying what I would hope as a matter of policy your legislation would include. Some of the proposed legislation does include this.

The legislation should include three things:

An effective separate disciplinary action for the police. Every other civilized country does this. Why cannot we?

Second: A meaningful civil tort claim remedy. Most other civilized countries, like Canada and Israel, do have such a remedy.

Third: Abolish the exclusionary rule as unnecessary and harmful because of the side effect which I have listed here.

It seems to me that at least this committee and this Congress should grapple with this fundamental issue and enact the first two; the disciplinary mechanism, and, secondly, the civil remedy for victims of illegal searches.

These two measures are something that nobody should oppose. Who can oppose a comprehensive system of discipline for the Federal law enforcement officers?

I have explained how that works in my testimony.

Who can oppose a civil remedy for victims?

There is no remedy for innocent victims of illegal searches now.

Even the most ardent civil libertarians surely would favor additional meaningful enforcement of the fourth amendment. If they oppose disciplinary measures for the police and if they oppose civil remedies for victims, they must have some strange interpretation in opposition to the fourth amendment or they must exalt the exclusionary remedy above the constitutional provision it was designed to support. Or perhaps they look upon the system of criminal justice as a game and they think that under the rules of the game, if the criminal accused plays it right, he is entitled to go free if the opponent, the policeman, makes a mistake.

So, I suggest to you that the Congress could take a great step forward by merely enacting effective disciplinary mechanisms for the police and an effective civil remedy for victims and say nothing about the exclusionary rule.

Let me emphasize I would favor abolishing the exclusionary rule, but certainly you could enact these first two as additional support for the fourth amendment because no one who supports the fourth amendment can really object to these.

My belief is that within 18 months after these two measures become effective, after it is seen how they work, that they are law, the discipline of the police and the civil remedy for the victims, within 18 months after that the Supreme Court will find a case in which it will say that the exclusionary rule is no longer needed to support the fourth amendment.

Thank you, Mr. Chairman.

Senator MATHIAS. Thank you very much, Judge Wilkey.

Professor Kamisar, I am like Andrew Marvell: At my back I always hear time's winged chariot hurrying near. But we will give you 1 minute.

Professor KAMISAR. May I just see that GAO study for a second, Judge Wilkey? I mean the one that I should be looking at.

[Whereupon, the GAO study was handed to Professor Kamisar.]

Professor KAMISAR. All right.

There is some confusion about the summary; whether it is 11 percent filed fourth amendment suppression motions or 33 percent who went to trial filed fourth amendment suppression motions.

All right. We will let that go.

Let me say this: Judge Wilkey is a very formidable spokesman on the other side and I spent an enormous amount of time preparing for this occasion. In fact, I went over all of the things Judge

Wilkey said elsewhere: I tried to anticipate some of the things he would say, so that when he said them again I had an answer and I got carried away. But I did not mean to be unfair. I apologize.

And I am not trying to tell the Senate how to read Supreme Court cases. I am simply trying to respond to a point by my antagonist in this setting who says the Supreme Court has never said so.

So, since you said that once before, and I spent hours and hours looking, I thought I could point out where it did say so and so. All right.

Now, the question is—one of the points that Judge Wilkey made and others make—where was the exclusionary rule until 1914?

Well, that sounds impressive. But, two answers:

One: Virtually all of constitutional law, as we know it today, grew up after 1914. All the law of freedom of speech and freedom of press grew up in the 1920's and 1930's. There was not even a right to assigned counsel in Federal criminal cases until 1938.

So, it seems to me that if we want to disparage the Federal exclusionary rule on the ground that it did not emerge until 1914, we can also disparage virtually all constitutional law as we know it today on the same ground.

Second: The Supreme Court did not have appellate jurisdiction over criminal cases until more than 100 years after the fourth amendment was framed.

Now, the statement about no other country.

Well, it is interesting that Judge (then Professor) Dallin Oaks, who wrote one of the most powerful attacks on the exclusionary rule, avoided that argument, because he recognized: We are the only country in the world that has a fourth amendment. He also pointed out as others have, that we have special problems. Historically we had a very heterogeneous society, unlike most of the Western European countries. We had discrete groups; blacks, Mexicans, Puerto Ricans, various groups of immigrants. We had a history of police mistreatment of these groups that is different from other countries.

One might as well say: How come the press has so much power in America? In England a newspaper would be held in contempt for commenting on some pending trial. We have more freedom of press and more freedom of speech than any other country in the world, too.

We also have a stronger separation of church and state than any other country.

We have many specific guarantees in a Bill of Rights.

But let me say—and it took me many hours, Judge Wilkey—there is another country. West Germany has an exclusionary rule; according to two German scholars. I refer the committee to an article by Thomas Volkmann-Schluck, and I think that is how you pronounce it, volume nine of the American Journal of Criminal Law. And I also have an unpublished manuscript by another German scholar (Walter Pakter)¹ which I will give to the committee, who says: The exclusionary rule has strong proponents in Italy, as in Germany. The United States is no longer the only country which invokes an automatic exclusionary rule.

¹ Retained in committee files.

Senator MATHIAS. Let me assure you that the Chair is not going to attempt to correct your pronunciation.

Professor KAMISAR. All right. OK.

Now, this point about the Coolidge case, well, you see, there is a perfect example of how it is easier to talk about a trivial or a good faith mistake in the abstract than in reality.

I ask Mr. Specter, Senator Specter, as a former prosecutor. The Attorney General, the chief law enforcement officer of the State, was issuing search warrants.

Now, to me that is fundamentally wrong. The whole idea of search warrants is to have a neutral body between the police and the citizens.

It is something that law students ought to learn the first week that they take criminal procedure; that a law enforcement officer cannot issue search warrants.

Now, finally, this point that the Congress has the duty and the power and the right to question the constitutionality of a doctrine and this notion that abolition or revision of the exclusionary rule is a petition for rehearing, I must respectfully dissent. I do not think it is the job of the Congress to petition for rehearing on every controversial issue.

Challenges to the exclusionary rule are raised in the Supreme Court every year. The literature is overwhelming. The point is being made over and over again by various Justices. It is being raised all the time.

I think Congress has better things to do than to petition for rehearing.

I must say that I think one of the saddest days in the history of Congress was the day it passed into law the so-called repeal of the *Miranda* rule and the *Escobedo* rule. The fact of the matter is that 14 years later it is a joke; nobody takes it seriously. The Supreme Court has never taken it seriously; it never will take it seriously. Even the critics of *Miranda* and *Escobedo* were shocked at that legislation. It just pretended *Escobedo* never happened. It just pretended *Miranda* never happened. It offered no alternative.

I agree 100 percent with Judge Wilkey on his last point. In fact, I say in my prepared statement on pages 66 to 70, fine, there is no conflict between the exclusionary rule and a more effective tort remedy or more effective police self-discipline.

We do not have to abolish the exclusionary rule to develop more effective alternatives because a great many cases do not produce evidence; a great many cases do not lead to prosecution; many cases, for example, only involve police harassment.

I say in my statement—and I am glad that I can end on a note of agreement—that if 1 year from now, 18 months from now, we see a significantly more effective alternative than we have seen up until now, then I think the case for abolishing the exclusionary rule and picking up that alternative instead would be very, very strong indeed. I say right in my prepared statement that if that better alternative is established, it is not at all unlikely that the Court might abolish the exclusionary rule on its own. Thank you.

Senator MATHIAS. Thank you very much, Professor Kamisar.

In your exchange here today, which has been very educational for the committee, you have together anticipated most of the questions that I might have asked.

I will take just a second to do as I did with the first panel and clear out the underbrush.

Professor Kamisar, you referred to the duty of Congress to make constitutional judgments and deprecated the idea of a petition for rehearing; and I certainly do not encourage that concept. But I do want the record to be clear that as far as I am concerned I think that there is a duty on the part of Congress to make a constitutional judgment on legislation that passes before us, and not simply to defer that to the Court—to pass the buck.

Judge Wilkey, I am just wondering if, in the historical allusion that you made to the fact that we had existed for 125 years without the exclusionary rule, there is any relevance to the fact that during most of that time there was no organized police force in much of the country. The London bobbies, who were generally recognized to have been the pioneers in law enforcement, did not come along until 1840 or 1850, and in this continent we were probably behind even that.

Judge WILKEY. I certainly think that is part of the explanation.

It was not until we got a large number of policemen and a large number of cases coming up that the problems arose.

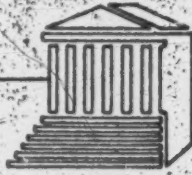
In my judgment, as Justice Douglas said, this was selected as the one from the choices we had to do it.

I think experience has shown for 70 years that now it is a bad choice and we ought to do something different.

Senator MATHIAS. Let me yield to Senator Specter.

Senator SPECTER. I think the testimony has been very enlightening. In view of the hour, I do not propose to ask any questions.

[The monograph of Judge Wilkey and prepared statement and submission of Professor Kamisar follow:]



National Legal Center for the Public Interest

**Enforcing the Fourth Amendment
by Alternatives to the
Exclusionary Rule**

MALCOLM RICHARD WILKEY

Introduction by
SENATOR ORRIN G. HATCH

This publication is one of a continuing series of original studies published by the National Legal Center for the Public Interest as part of its educational program.

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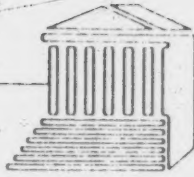
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FOR THE PUBLIC INTEREST

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National Legal Center for the Public Interest

Enforcing the Fourth Amendment
by Alternatives to the
Exclusionary Rule

by
JUDGE MALCOLM RICHARD WILKEY
of the United States
Court of Appeals
for the District of Columbia Circuit

Introduction by
U.S. SENATOR ORRIN G. HATCH

March 1982

About the Authors

MALCOLM RICHARD WILKEY was appointed in 1970 to the U.S. Court of Appeals for the District of Columbia and has gained national recognition for his well-reasoned opinions. A *magna cum laude* graduate of Harvard University and a member of Phi Beta Kappa, Judge Wilkey served as a U.S. Attorney from 1954-58 and as Assistant Attorney General of the United States from 1958-61. He served as the U.S. delegate to the UN Judicial Review Conference in 1959. After practicing law in Houston, he became general counsel and secretary of Kennecott Copper Corporation in New York until his appointment to the appeals bench. Judge Wilkey has written widely in legal and professional publications, has been active in bar and judicial organizations, and has served as a law school lecturer both in the U.S. and abroad. He was a principal participant in NLCPI's 1977 conference on "THE ROLE OF THE JUDICIARY IN A DEMOCRATIC SOCIETY," the first national conference to consider "judicial activism."

CHARLES F. BARBER received his B.S. from Northwestern University in 1939 and graduated from Harvard Law School in 1942. He attended Oxford University as a Rhodes Scholar and received his B.A. in 1948. He was assistant to the U.S. Solicitor General for two years. After six years in private practice, he joined ASARCO, Incorporated, where he is chairman of the board. He is chairman of the Board of Directors of the National Legal Center for the Public Interest, and has been a director since 1975 when NLCPI was founded.

ORRIN G. HATCH is a United States Senator from Utah. He received his B.S. degree from Brigham Young University and graduated from the University of Pittsburgh Law School after which he practiced law for 15 years. Senator Hatch is Chairman of the Senate Committee on Labor & Human Resources, and is Chairman of the Constitution Subcommittee of the Senate Judiciary Committee.

Preface

Charles F. Barber

"The right of the people to be secure . . . against unreasonable searches and seizures . . ." guaranteed by the Fourth Amendment is a precious right. Some 67 years ago, the Supreme Court held that evidence obtained in a forbidden search could not be received in evidence in a federal criminal trial. In this perceptive and positive monograph, Judge Malcolm Richard Wilkey presents the case for abandoning this exclusionary rule in favor of other fairer and more effective methods of enforcing the Fourth Amendment.

In his distinguished career, Judge Wilkey has served as federal prosecutor in Texas, Assistant Attorney General, Criminal Division, U.S. Department of Justice, and for the last 11 years as judge of the Court of Appeals of the District of Columbia Circuit (C.A.D.C.). In each of these capacities, he has observed and thought deeply about the practical consequences of the rule. As spelled out in this monograph, the costs are real and measurable. Judge Wilkey describes the burdens on the courts* and the glaring distortions in administration of justice which he has observed.

These costs should be regarded as intolerable, he says, because they are unnecessary. There are better ways to make the Fourth Amendment protection against unreasonable searches and seizures a practical reality. One who ignores the record of experience, particularly over the last 20 years, he has said, has to be in love with the rule itself, not the Fourth Amendment.

Judge Wilkey's discussion of remedies, that is, of alternatives to the exclusionary rule, is a timely and important contribution to the ongoing debate. Reform can come through legislation or through decisions of the courts themselves. The genius of our constitutional system is

*In the last three years, 228 of the criminal cases before the C.A.D.C. in which opinions were filed involved issues of exclusion of evidence requiring analysis and decision. A recent General Accounting Office study of the federal judicial system found that 33% of the defendants who went to trial filed Fourth Amendment suppression motions. A review of Judge Wilkey's opinions reveals that he for the court, or in dissent, has found it necessary to deal with application of the rule in no fewer than 13 opinions.

that we have within our governmental structure diverse means of responding to the teaching of experience.

This monograph is being published as a public service by the National Legal Center for the Public Interest. Judge Wilkey had previously contributed to the work of the National Legal Center as moderator of a panel at its 1977 Conference: "The Role of the Judiciary in a Democratic Society."

Charles F. Barber, Chairman
National Legal Center
for the Public Interest

Introduction

Orrin G. Hatch
United States Senator

The most fundamental tenet of our criminal justice system is that a man's guilt or innocence should be ascertained by considering the evidence. The basic assumption of this system is that if all evidence is produced in court, it can be given proper weight and lead the court to a decision as close to the truth as is humanly possible. The exclusionary rule ignores this fundamental tenet. As the rule now operates, a criminal, who may have in fact committed a dreadful violent crime, is set free, not because he is innocent but because a court feels that the evidence necessary to establish his guilt was obtained in an unreasonable fashion.

In 1914, the Supreme Court first created the rule that evidence secured by Federal officers contrary to the Constitution's policy against "unreasonable searches" would be inadmissible in Federal criminal trials. *Weeks v. United States*, 232 U.S. 383 (1914). The rule's creator later extended it to encompass the States. *Mapp v. Ohio*, 367 U.S. 643 (1961).

From its inception, however, the exclusionary rule has drawn criticism for its many flaws in reasoning and operation. In 1926, for instance, Justice Cardozo, then authoring a unanimous opinion for the New York Court of Appeals, succinctly encapsulated many of the rule's flaws in a single phrase: "The criminal is to go free because the constable has blundered." *People v. Defore*, 244 N.Y. 13 (1926). Instead of subsiding after 68 years, those criticisms are actually crescendoing. The Attorney General's Task Force on Violent Crime recently faulted the rule for "barring evidence of the truth, however important, if there is any investigative error, however unintended, or trivial." Task Force Final Report, page 55. At the American Bar Association 1981 annual meeting in New Orleans, Vice President Bush decried any "lawyer who gets a brutal murderer acquitted by a deft use of the exclusionary rule." A few weeks later in a major crime address, President Reagan stated that the rule was based on an "absurd proposition."

The absurd proposition is that the exclusionary rule actually deters law enforcement officers from conducting unreasonable searches. The Supreme Court has clearly indicated that indeed "the rule's primary purpose is to deter future unlawful police conduct." *U.S. v. Calandra*, 414 U.S. 338, 347 (1974). The logic of this deterrence theory was severely questioned nearly 30 years ago when Justice Jackson noted:

That the rule of exclusion and reversal results in the escape of a guilty person is more capable of demonstration than that it deters invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrongdoing official, while it may, and likely will release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best. *Irvine v. Col.*, 347 U.S. 128, 135 (1954).

Later, ten years after the rule had been applied to the States, Dallin Oaks did an exhaustive study in search of the so-called deterrent effect. His conclusion is just as valid another ten years later:

Today, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness. 37 U. of Chi. L. Rev. 665, 672 (1970).

The chorus of critics is growing more numerous and persuasive with every assertion that the rule releases "countless guilty criminals" (Chief Justice Burger, 403 U.S. at 416), "sounds more like law-making than construing of the Constitution," (Justice Black, 381 U.S. at 648), "unrealistically requires that policemen investigating serious crimes make no errors whatsoever" (Justice Rehnquist, 417 U.S. at 433), acts as "a senseless obstacle to aiming at the truth in many criminal trials" (Justice White, 428 U.S. at 537), "fails to achieve its stated purpose and has imposed substantial costs on society in the process" (ABA Division of Judicial Administration report). Add to this incomplete list of legal scholars and institutions questioning the rule and seeking a reasonable and workable alternative Judge Malcolm Wilkey and the National Legal Center for the Public Interest. Their timing for this valuable study could not be more impeccable. Not only have the President and other leaders recently focused attention on the fallacies of the rule, but the Senate is more disposed than any time in recent memory to legislate an alternative. Hearings are already underway in the Senate Judiciary Committee with this purpose in mind. This insightful work by Judge Wilkey should enhance that entire legislative process.

In his study, Judge Wilkey provides us an insightful review of the judicial origins of the rule and the results flowing from its application, so that his suggested alternatives to the rule take on clear meaning. Of particular interest in this regard is Judge Wilkey's persuasive impeachment of the so-called "good faith" alternative. The Judge effectively

contends that keeping the rule except when officers have acted in the reasonable "good faith" belief that they were conforming to the Fourth Amendment perpetuates present problems and creates two new ones. For example, the "good faith" exception would perpetuate the rule's failure to give innocent victims of illegal searches any remedy at all. The rule presently only benefits the truly guilty who are likely to be released due to the suppression of key evidence. The "good faith" exception also compounds the court's burden of determining when the rule should operate and provides no discipline for the misbehaving officer. In addition, the "good faith" exception would establish a premium on ignorance and would, after 67 years, finally enshrine the exclusionary rule in statute.

I would urge all who read this work and particularly my Senate colleagues, to keep in mind Justice Black's exhortation in *Wolf v. Colorado*, 388 U.S. 25 (1949):

The Federal Exclusionary Rule is not a command of the fourth amendment but is a judicially created rule of evidence which Congress might negate.

Judge Wilkey has made a signal contribution to the study and understanding of this subject; his paper deserves the widest possible readership among opinion and decision makers, the judiciary and the general public:

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Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule

Malcolm Richard Wilkey

The principal purpose of this study is not to present a case for abolition of the exclusionary rule — that has been and is being done with gratifying weight and frequency — but to move beyond the rule's repeal to analyze what should replace it in the enforcement of the Fourth Amendment. Before going to alternative methods of enforcement, it would be well to look briefly at where we are now. The evils created by the exclusionary rule are described, not as an exercise in denunciation, but as the necessary backdrop to intelligent reform. (If this catalogue of the rule's vices seems overly long, remember that I come not to praise Caesar but to bury him.)

The Fourth Amendment to the Constitution spells out that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated." The exclusionary rule is a judge-made rule of evidence which bars "the use of evidence secured through an illegal search and seizure."¹ The Supreme Court has never held that this rule is required by the constitutional provision it is designed to support. As the evils of the rule have become more apparent since it was created in 1914,² and particularly since 1961,³ dissatisfaction has mounted to the point where there are serious efforts in the Congress and in the present Administration to abolish, modify, or replace it. Evident unhappiness with the rule in the Supreme Court has led to frequent reminders as to its irrationality and to a trend, obvious at least since 1971,⁴ to limit its application.

There is no movement afoot to repeal or modify the Fourth Amendment. It is well to keep this in mind whenever the exclusionary rule problem is discussed, because proponents of the rule frequently confuse this particular remedy for a violation of the Fourth Amendment

¹*Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

²*Weeks v. United States*, 232 U.S. 383 (1914). For this analysis I largely omit *Boyd v. United States*, 116 U.S. 616 (1886), which turned on a violation of the Fifth Amendment and in which there was no actual search and seizure. I raise no point herein about exclusion of evidence based on Fifth or Sixth Amendment violations, which to my mind rest on entirely different and more logical rationales, e.g., lack of trustworthiness.

³*Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 490-91 (1971) (Harlan, J., concurring).

with the Amendment itself. While it is desirable and understandable that we keep the Bill of Rights enshrined in our hearts and in the forefront as a mandatory guide to our legislative and judicial acts, no such deference is due the exclusionary remedy created 125 years after the Fourth Amendment. It is barely possible that human ingenuity can now devise something better. After all, as Justice Holmes said, "[T]he life of the law is not logic; it is experience."⁵ We now have enough experience to know the defects in the exclusionary remedy and to look elsewhere for a more effective tool to enforce the Fourth Amendment.

I. THE EXISTING EVIL

A. *"The criminal is to go free because the constable has blundered"*⁶ (Cost 1)

The most vivid, visible cost of the exclusionary remedy is that the most undeniable, valid, trustworthy, conclusive, irrefutable factual evidence is excluded from the knowledge of the jury or consideration by the court. Justice is, or should be, a truth-seeking process. The exclusionary remedy eliminates the most important evidence from that process. This is particularly true, and the cases arise most often, when guns, narcotics, and gambling paraphernalia are concerned. This occurs so frequently in gun cases, for example, that it is arguable that we can never have any effective form of gun control unless the exclusionary rule is abolished.⁷

There is never any question of reliability about the evidence excluded by the rule. We are not talking about questionable evidence, such as coerced confessions, whose dubious accuracy is an independent and logically defensible ground for their exclusion. The gun, the narcotics, the gambling policy slips, are either found in the possession of the accused or not. If they are, and the search was invalid, then the rule rigorously excludes them.

B. *While Only the Undeniably Guilty Benefit from the Exclusionary Rule, it Offers Innocent Victims neither Protection nor Remedy* (Cost 2)

⁵O. Holmes, *The Common Law* 1 (Howe ed. 1963).

⁶Chief Judge Cardozo continued: "A room is searched against the law, and the body of the murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free." *People v. Defore*, 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588, cert. denied, 270 U.S. 657 (1926).

⁷See the author's analysis of this point in *Why Suppress Valid Evidence?*, *Wall St. J.*, 7 Oct. 1977, at 4, col. 4-6; and *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 *Judicature* 215, 224-25 (1978).

We normally evaluate public policies by their announced purpose and visible result. I submit that the whole purpose of criminal law is to protect innocent people, *i.e.*, society as a whole. Whom does the exclusionary remedy protect? Only the unquestionably guilty. If there is an unreasonable (illegal) search, a gun is found, the guilty man goes free. If there is an unreasonable (illegal) search, no gun is found, the innocent person has no right of redress. The exclusionary remedy flunks the basic test of protecting society.⁸

The Fourth Amendment forbids only "unreasonable searches and seizures." Reasonable searches, as well as other intrusions into our personal lives, are permitted for the purpose of protecting innocent people. The search for weapons at the airport or at the entrance of our courthouse is to protect innocent people, not for the joy of harassing the passenger or any other citizen. The search for narcotics on the street is an effort by the police to protect society as a whole from the drug traffic. Similarly, so is the search for gambling paraphernalia, or the search for contraband being smuggled across our borders. To the extent that law enforcement searches are discouraged by the uncertainty in the law of search and seizure and the feared application of the exclusionary rule, the protection of innocent people is reduced.

C. *All Internal Disciplinary Efforts of Federal Agencies and State Police are Sabotaged by the Exclusionary Rule in any Form (Cost 3)*

No law enforcement agency will go all out to discipline an erring officer, if the result will be to sabotage the prosecution later by demonstrating that the evidence should be excluded because of an illegal search. In a converse time situation, no law enforcement agency will discipline its officer if a federal trial judge has already found that the search was legal, *i.e.*, that the officer acted properly by that judge's appraisal of the facts known to him in the particular case. Even after a bargained plea of guilty, the law enforcement agency will be afraid to discipline the officer for improper conduct for fear of giving the convicted and incarcerated criminal a clear shot at one of the numerous post-conviction remedies now so widely available.

The blocking of internal disciplinary efforts will hold true so long as any vestige of the exclusionary remedy remains. So long as a finding of fault in any degree on the part of the officer may bar evidence vital to the prosecution, no police agency will discipline its own. Carving

⁸Proponents of the exclusionary rule would assert that it protects *indirectly* by deterring future violations. This is fallacious: (1) there has never been any empirical proof that this is true, *see* Part II. "Burden of Proof" *infra*; (2) even if it were true, it would not establish that other remedies for violations of the Fourth Amendment would not create equal or better deterrence of future violations, without the undeniably horrible side effects of the exclusionary rule.

out a so-called "good faith" exception to the exclusionary rule, which leaves "bad faith" conduct as sufficient to bar the evidence seized, would thus continue to guarantee no internal discipline.

D. *An Intolerable Burden is Thrust upon the Courts*

The total impact of the exclusionary rule upon the judicial system has rarely been described and even more infrequently weighed accurately. To my mind as a judge, this overall impact is even more pernicious than the much more visible cost of permitting the guilty to go free. Even if we modify the exclusionary rule to reduce the incidence of the undeniably guilty being set free, as would probably occur by adoption of the "good faith" exception, yet distortion in our system of justice, the sheer drag on the judges, and the public's perception of and lack of confidence in our judiciary would remain. Since this corruption, distortion, and burden on the judicial system are so little recognized by laymen, it is worth more extended discussion than given the above listed evils of the exclusionary rule.

1. The Additional Sheer Work Load (Cost 4)

Empirical evidence on the effect of the exclusionary rule has always been difficult to gather and, even when gathered, difficult to interpret properly. For example, after the April 1979 General Accounting Office (GAO) study on the "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," which covered 42 of the 95 U.S. Attorneys' offices in the country, the supporters of the exclusionary rule trumpeted loudly that the study showed that the rule had very little impact on our system of justice. They argued this from statistics which showed that evidence was excluded in only 1.3% of *all* the cases in the U.S. Attorneys' offices.⁹

If our concern is the burden of the rule on the judicial system, this statistic is utterly meaningless. First, the 1.3% is a percentage of *all cases* brought into the U.S. Attorneys' offices, not even into the court system, much less brought to trial. The category "all cases" includes

⁹Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. CGD-79-45 (19 April 1979) [hereinafter "GAO Study"]. In addition to the undeniable major impact shown on the federal judicial system, the true impact of the exclusionary remedy may be much more at the state rather than the federal level, because most criminal justice is meted out by the states, and because state officers are frequently less well trained and effectively disciplined than federal officers. Some confirmation of this is found in the fact that all empirical studies of state criminal systems have shown a much higher percentage of suppression motions granted than is found in the federal system by the GAO Study. S. Schlesinger, *Exclusionary Injustice* 50-57 (1977).

cases in which the prosecution was dropped for one reason or another, disposed of by pleas of guilty, or even terminated by such causes as the death of the accused. Second, the *result* of exclusion is immaterial to the burden on the judicial system (although it imposes a cost on society by putting the criminal back on the street). Whether a judge grants the motion to suppress or denies it is immaterial as to the burden on the court; he still must study carefully the law and the arguments, and make a decision on a point which should never be raised in the main trial of the accused in the first place. The percentage of *all cases* brought into the prosecutorial system in which evidence was excluded on Fourth Amendment grounds may be of interest to statisticians or law professors, but not to a working judge.

As far as a sitting judge is concerned, the pertinent statistic is how often a Fourth Amendment suppression motion *arises* in a case going to trial. On that critical point the GAO stated, "*Thirty-three percent of the defendants who went to trial filed Fourth Amendment suppression motions.*"¹⁰ *This is the heart of the burden on the judicial system.* These are the contested cases, here is the visible battle, where the suppression motion and the application of the exclusionary rule may well be decisive of the case. This is *the most important single issue arising most frequently in criminal trials.* Other statistics in the GAO study illustrate this: 60.1%¹¹ of all motions filed involved the Fourth Amendment. Since the next most numerous type motion, confessions, amounts to only 23.2%,¹² we see that there is no single type legal issue which even comes close to Fourth Amendment search and seizure motions for importance in the trial of criminal cases. The burden on the trial court is demonstrated and undeniable.

Not only is the Fourth Amendment suppression question the most important litigated issue at the trial level — important not only in percentage but also in sheer volume of work required of the court — but if there is a conviction, in my experience this almost invariably forms one of the points — perhaps the principal point — on appeal. The GAO study in 1979 dealt with statistics in the U.S. Attorneys' offices and thus only partially reflected the exclusionary rule's impact on the trial courts; it did not tabulate the burden on the appellate courts in any way. I have done so in our own D.C. Circuit for the years 1979, 1980, and 1981.¹³ In the three years 1979-81 we wrote opinions in 95 criminal cases, in 21 of which, or 22.1%, the question of excluding the

¹⁰GAO Study, *supra* note 9, at 1 (emphasis added).

¹¹*Id.* at 8.

¹²*Id.*

¹³Statistical years 1 July 1978 through 30 June 1981.

evidence because of an alleged illegal search and seizure required analysis and decision.¹⁴ Issues in criminal cases in the D.C. Circuit may or may not be typical of the remainder of the federal judicial system, but the 22.1% probably represents the issue occurring in our circuit with the greatest frequency. Search and seizure questions not only occur with frequency, but when they do occur, they are apt to produce sharp divisions, with lengthy and separate opinions, as witness our recent *en banc* decision in *United States v. Ross*¹⁵ with five separate opinions totalling 51 pages.

This description of one of the costs of the exclusionary rule should not be concluded without noting that arguments advanced by proponents of the rule relying on the GAO or similar studies are always based on a totally false or reversed fundamental premise: that the rule's desirability should be decided by forcing the opponents of the rule to prove by reliable empirical data — extremely difficult to obtain in this field — that the cost to our system of justice is too great. That is not the way we evaluate any other rule of evidence. When competent, trustworthy, relevant, and material evidence is offered on behalf of a litigant, the trial court is obligated to let it in; to do otherwise is to deny the court part of the truth and thus to distort the justice-seeking process. Only if there is a demonstrated overriding affirmative good to be achieved by barring the evidence is such evidence excluded — and the burden of demonstrating this overriding affirmative good to be achieved is always on him who would bar the evidence. This burden of proof is discussed in Part II, *infra*.

2. The Misplaced Burden on the Judiciary — Doing the Executive's Job (Cost 5)

The issue before the court in every criminal case is the guilt or innocence of the accused. The whole criminal justice system is set up to answer this central question. But the answer to the question whether the accused was in possession of the contraband or the gun is not affected in the slightest by whether the officer making the search complied with the Fourth Amendment. The legality of the officer's conduct is logically irrelevant to the fact question of what was seized and from whom. When the conduct of the officer is introduced as a critical

¹⁴Compiled by author from opinions published by the District of Columbia Circuit 1 July 1978 through 30 June 1981. We also disposed of 261 cases by means other than published opinions. A search of the trial record in each individual case would be necessary to ascertain the issues involved. Both the disposition by opinions and otherwise reflect consolidated cases, which will include two or more individual defendants. In this respect the data base cannot be compared to the GAO Study of cases (defendants) in U.S. Attorneys' offices.

¹⁵655 F.2d 1159 (D.C. Cir.) (*en banc*), cert. granted, 102 S.Ct. 386 (1981).

issue bearing on the guilt or innocence of the accused, a totally extraneous element is thus injected into every criminal trial involving a search and seizure. This has been and will be an unabated waste of judicial resources.

I say waste of judicial resources because the responsibility for the selection, training, and discipline of law enforcement officers is the prerogative of the Executive Branch. In every other civilized country in the world this is so. No other country has the judge-made and judge-applied exclusionary rule of evidence as does the United States. The citizens of other countries rely upon the Executive to control the police and upon the political process, not the judicial process, to control the Executive. The judiciary cannot effectively do the Executive's job — certainly not by the ineffective exclusionary rule — nor should it try by any device. Responsibility should be placed where it belongs, on the Executive Branch, and the judiciary relieved of this self-imposed duty and self-inflicted wound.

3. The Misplaced Burden on the Judiciary — Depriving Innocent Defendants of Adequate Due Process (Cost 6)

Since the rule diverts limited resources allocated to the criminal justice system from the trial of criminals to the trial of the police, innocent criminal defendants may be denied a real chance for a fair trial. These innocent defendants represent a class victimized by the exclusionary rule but unnoticed because attention normally is focused on the boon the rule provides to the guilty. Of course, many a guilty man owes his freedom to the rule, the underlying presumption being that holding the police in check is more important than holding criminals in check, whatever the common experience of city dwellers might be to the contrary. Innocent defendants, however, may, with the public, be indirect victims of the rule.

The successful functioning of the criminal justice system depends on the quantity and quality of the resources committed to it, which have always been too little. The American standard of "due process" elevates the demand on whatever system is financed. The result has been plea-bargaining, ostensibly the only way to keep the whole system from bogging down. Many innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge; the dire consequences of recalcitrance in bargaining often pose too great a risk to an innocent defendant who fears he may be erroneously convicted after a trial conducted by an ill-compensated and ill-prepared defense lawyer.

It is against this background that we must measure the diversion of energy, talent, and dollars from the central task of fairly determining

the guilt and innocence of defendants into the work of adjudicating whether the police have blundered. Plainly, what we have in the way of prosecutors, judges, and legal aid attorneys has been spread too thin to permit the allocation of these scarce resources to remote indirect police discipline. That function should be performed elsewhere and by others. It is the Executive Branch which hires, fires, trains, rewards, and normally disciplines law enforcement agents. Not only logically should the prerogative of control be with the Executive Branch but disciplinary action can be carried out more cheaply in a simpler administrative process; the judicial system is the most expensive and cumbersome for administering anything. The exclusionary remedy thus literally buys *what little* Fourth Amendment protection it affords *at the cost* of fewer and less adequate trials for criminal defendants. Even if the rule did a fair job of promoting Fourth Amendment values, this would be at best a questionable bargain.

E. *The Rule Warps and Distorts the Administration of Justice*

1. Producing Perjury by the Police (Cost 7)

With the knowledge of the result of the exclusionary rule, the necessity of determining whether the search was legal or illegal is an outright encouragement to perjury by the police. Policemen are human; they know that in most instances, particularly cases involving narcotics, guns, or gambling paraphernalia, the criminal will go free if the search is declared illegal. Admissibility of the evidence, and conviction of the undeniably guilty criminal, may ride entirely on the officer's testimony. Even the most honest and objective officer is likely to yield to the temptation, based on his belief that the good of society demands that this criminal be put behind bars, to shade, alter, or even fabricate testimony to be sure that the search and seizure are pictured as legal.

With the police placed in this posture, there is inherently an incitement to more than the use of perjured testimony. There is the tacit validation of a fraudulent *methodology* engendered by the exclusionary remedy — "true justice" may require fabrication. Once this mind-set is legitimated, innocent accused as well as "undeniably guilty" defendants may be affected by zealous policemen's sense of "justice."

2. Making Hypocrites out of Judges (Cost 8)

The necessity of deciding the exclusionary issue makes hypocrites out of judges. With a conflict in evidence, the judge will be inclined to

"believe" the officer, even if he well knows from all the surrounding circumstances the officer is lying. The judge, too, is human, and is conscious of the "higher good," that the unquestionably culpable should be found guilty and punished. The trial judge has the right to weigh the credibility of the witnesses; it would not be thought extraordinary if he found the testimony of one (or even more) police officers to outweigh that of the accused and his criminal confederates. "True" justice will be done, *i.e.*, the guilty *will* be punished, even if the verdict is based on falsehood.

3: Expanding the Scope of Search and Seizure for All Citizens (Cost. 9)

Not only does the existence of the exclusionary remedy make liars out of policemen and hypocrites out of judges, but in a very real sense it also diminishes the protection of the Fourth Amendment for honest citizens. Civil libertarians should be aware that in addition to giving credibility to incredible testimony of policemen, judges are likely to move toward dangerously expanded notions of what is legal search and seizure in order to avoid suppressing evidence. Standards of what is a permissible or "reasonable" search and seizure apply equally to the just and the unjust, so expanded areas of reasonableness permit and encourage police actions against *all* citizens which otherwise might not occur.

So, in fact, far from enhancing Fourth Amendment guarantees, in the long run the exclusionary remedy undoubtedly erodes Fourth Amendment protections. If one were diabolically to attempt to invent a device designed slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule. Every trial lawyer understands how much easier it is to get a favorable ruling on the law if the facts of his case are attractive and his client, cosmetic. But the exclusionary rule neatly assures that nearly every Fourth Amendment question litigated involves unsavory facts and disreputable clients. Often, a ruling favorable to a broad reading of the Fourth Amendment will result in freeing a criminal plainly guilty of the most heinous offenses to prey once more on the public. Courts are not unaware of the consequences of their rulings; judges cannot help but strain to avoid such an outcome, if possible. So whatever short-term benefits the rule might achieve by way of additional compliance must be more than counterbalanced by a slow but certain narrowing of the substantive reach of the Fourth Amendment. A different mechanism for enforcing the Fourth Amendment, as we shall see later, would greatly reduce the number of obviously guilty career criminals who invoke the rule, and thus the Fourth Amendment

would be considered in the context of its value to a more representative cross-section of all the citizenry.

4. Lack of Proportionality — the Criminal (Cost 10)

Another distorting burden for the judiciary is that the exclusionary remedy is an all or nothing affair, a meat-axe approach; it fails to distinguish between more and less serious crimes. The remedy, irrespective of the dangerous nature of the offense committed by the criminal, will always be exclusion of all seized evidence. The pickpocket will go free, and so will the murderer, if the officer is found to have exceeded the area of "reasonableness" in making his search and seizure. This is a lack of proportionality which we do not tolerate in administering punishment anywhere else in our system of criminal justice.

5. Lack of Proportionality — the Officer (Cost 11)

This meat-axe approach, this lack of proportionality, applies likewise to the officer's conduct. If an officer barely oversteps the bounds of a reasonable search by stopping and searching a suspicious looking character at 2:00 a.m. on a dark street, and turns up an illegal gun or narcotics, the seized contraband will be suppressed. The same remedy — mere exclusion of the evidence — will be invoked if Internal Revenue Service agents burst into the home of a hitherto thought-to-be honest citizen without a warrant and, after ransacking his private papers, come away with evidence of tax evasion. In neither case will the citizen be able to compel the discipline of the erring officers, nor will he be able to recover damages from the Government. (This will also be true if no gun, no narcotics, or not a scrap of incriminating paper is found.)

Thus the penalty of the exclusionary rule is administered with a sense of proportionality reminiscent of those medieval penal systems that prescribed capital punishment for everything from pickpocketing on up. The rule falls mercilessly on all evidence deemed to have been seized unconstitutionally, without regard for the gravity of the police misconduct or the seriousness of the crime of which the defendant has been charged. Even if the policeman's actions, despite his good faith, were only marginally in violation of the Constitution, and even if the criminal is guilty of rape and murder, still the evidence stays out. Such disproportionality would be regarded as barbaric if used to deter crime; ironically, employed to deter the police many apparently consider it "progressive."

6. Resulting Diminished Respect for the Judicial Process (Cost 12)

It is thus not surprising that we find an ancillary burden on the courts in the resulting diminished respect for the entire judicial system brought about by the absurdity of the exclusionary rule.

First, excluding evidence seized "illegally" has always been a totally irrational response to the illegal conduct of an individual law enforcement officer. Why exclude the most credible kinds of evidence simply because of an individual officer's misconduct? Why punish all of society by letting the criminal go free and the officer go unpunished? The *absurdity* of this cause and effect as a rule of law is so obvious that its mere statement should embarrass its sponsors. There has never been any rational justification advanced for this cause and effect.

Second, to the extent that the recognized guilty are freed by the exclusionary rule, it always diminishes public respect for the legal and judicial system. The layman says, "He got off on a technicality." The layman is right. If the criminal was sprung by the exclusionary rule, he did get off on a technicality, a technicality whose application breeds disrespect for all law.

A third breeding ground of disrespect for the judicial process is the recognition by knowledgeable laymen that many accused, guilty of the most heinous crimes, get off with light sentences by the process known as "plea bargaining." While plea bargaining has its defenders, surely there is no valid argument that we ought to have plea bargaining instead of convicting the accused on unquestioned evidence in a straightforward manner. The exclusionary rule intensifies plea bargaining, since a questionable search is always a bargaining point between prosecution and defense.

TO SUMMARIZE:

The almost unbelievable, and entirely unremarked, fact is that all of the above twelve evils of the exclusionary rule are virtually undeniable. Indeed, there is hardly any dissent from the observation that each and every one of the twelve evils cataloged above exists because of the exclusionary rule. The argument for maintaining the rule rests entirely on the argument that, despite its manifold disadvantages and outrageous evils, the rule is justified by something affirmative and positive it does for us. Whether it actually does anything constructive has been a matter of dispute, which we now consider.

II. BURDEN OF PROOF

The Supreme Court has never held that the exclusionary remedy is mandated by the Fourth Amendment. While some ardent proponents

of the rule would argue that it has now become a constitutional fixture, there is absolutely no authority for this, and most proponents of the rule freely admit that it is simply the *remedy chosen* by the Supreme Court to enforce the Fourth Amendment.

The most shocking thing about the position of exclusionary rule proponents is the blithe assumption that a rule of evidence which excludes the most valid, unquestioned, convincing evidence against the accused, and frequently results in setting him free in spite of his obvious guilt, is somehow a *normal* method of administering justice. Proponents of the rule never face up to the issue that, *if there is a choice of remedies* to enforce the Fourth Amendment (and there is), *the burden* of justifying this extraordinary exclusion of evidence and costly result of setting the guilty free *is on the proponents of such an evidentiary rule*.

While the Supreme Court from *Weeks* (1914) through *Mapp* (1961) justified the rule as protecting the privacy of the individual, and from time to time referred to the use of illegally obtained evidence as bringing the court system into disrepute, it is clear today that the principal and almost sole theory is deterrence.¹⁶ "[T]he rule's prime purpose is to deter future unlawful police conduct," as Justice Powell said in *United States v. Calandra*.¹⁷

Though placing the rationale on the ground of hoped-for deterrence, the Supreme Court has freely admitted that the exclusionary remedy has many costs and disadvantages.

The costs of applying the exclusionary rule even at trial and on direct review are well-known: . . . [T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.¹⁸

If these are some of the admitted costs, and if the rationale is deterrence, then I submit the burden is clearly on the proponents of the exclusionary remedy to prove that its purported deterrence works.

Yet, there has been only one attempt in 68 years by a member of the Supreme Court (not the whole Court) to demonstrate empirically that the exclusionary remedy has any deterrent effect whatsoever.¹⁹ In

¹⁶This has been established at least since *Linkletter v. Walker*, 384 U.S. 618 (1965), or earlier, *Elkins v. United States*, 364 U.S. 206 (1960).

¹⁷414 U.S. 338, 347 (1974).

¹⁸*Stone v. Powell*, 428 U.S. 465, 489-90 (1976) (footnotes omitted).

¹⁹This is in sharp contrast to heavy reliance on empirical data in such landmark cases as *Brown v. Board of Educ.*, 349 U.S. 294 (1954).

Justice Murphy's dissent in *Wolf v. Colorado*²⁰ he referred to the results of a questionnaire, which had been sent to only 38 out of the nation's 40,000 police agencies, and to which there had been 26 responses. Eleven out of the 26 responses indicated, in Justice Murphy's opinion, that there had been an increase in police training on search and seizure as a result of the adoption of the 1914 *Weeks* rule of exclusion. I will leave it to the social scientists and statisticians to analyze the framing of the questions, the data sample in relation to the universe, the nature of the responses, etc.²¹ I will simply say that neither this nor any other empirical survey has ever been referred to by the Supreme Court again to justify the remedy.

In truth, there never has been proof, only a theoretical assumption and a fond hope that the remedy works. Dallin Oaks' conclusion in 1970 remains uncontradicted:

[T]oday, more than fifty years after the exclusionary rule was adopted for the federal courts and almost a decade after it was imposed upon the state courts, there is still no convincing evidence to verify the factual premise of deterrence upon which the rule is based or to determine the limits of its effectiveness.

[I]n the absence of any better alternative, we are willing to take the deterrent effect of the exclusionary rule solely on the basis of assumption.

In sum, the rhetoric concerning the factual basis for the exclusionary rule amounts to no more than "fig-leaf phrases used to cover naked ignorance."²²

Professor Steven Schlesinger has analyzed the several empirical studies on the effects of the exclusionary rule which were made between 1950 and 1971 in five major American cities — Boston, Chicago, Cincinnati, New York, and Washington, D.C. All of the studies but one concluded that the exclusionary remedy was a failure in deterring il-

²⁰338 U.S. 25, 44-47 (1949).

²¹This is very ably discussed by Circuit Judge John Gibbon, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 Seton Hall L. Rev. 295 (1972):

Of the eleven, he observed that police training with respect to the rules of search and seizure is extensive in cities in five of the six states which by state action adopted the *Weeks* rule, and negligible in four out of five of the cities in states which had not followed *Weeks*. Justice Murphy concluded: "The contrast between states with the federal rule and those without it is thus a positive demonstration of its efficacy."

Justice Murphy's rough and ready attempt at an empirical approach, and his broad overstatement of any conclusion which could properly be drawn from his limited data, are hardly models of behavioral science research. Yet his attempt was, and is to this day, the only attempt by proponents on the Court to demonstrate empirically that the exclusionary rule has the effect upon the target population which is now its most frequently asserted justification.

Id. at 302 (footnotes omitted).

²²Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 672, 678 (1970).

legal police conduct,²³ and this lone study found the empirical data inconclusive: "They do not nail down an argument that the exclusionary rule has accomplished its task."²⁴

In a case which signalled the Supreme Court's gradual rejection of the primacy of the exclusionary rule, Chief Justice Burger flatly declared, "[T]here is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."²⁵ And later in the same opinion he urged: "[W]e should be prepared to discontinue what the experience of over a half century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct."²⁶

In light of the foregoing, it should be clear that the proponents of the exclusionary rule have rarely attempted to carry their burden of proof and have never done so.

There is a widespread current feeling that change is overdue. Before getting into details of the specific alternative proposals, let us look first at what they seek to accomplish.

III. THE OBJECTIVES OF REFORM

A. *Lift the Burden on the Courts by Placing Responsibility for Disciplining the Police Where it Belongs — On the Executive Branch*

As the Supreme Court has developed its doctrine, the sole rationale now for applying the exclusionary rule is the hoped-for deterrence of future illegal police action. It is, in other words, simply a second-hand method of police discipline. The order of business should be to make discipline first-hand by putting the responsibility on the law enforcement agency employing the errant officer, or on a review board with responsibility for more than one agency.

B. *Provide Prompt and Effective Guidance to the Police*

The police need and desire prompt and effective guidance as to proper conduct within the Fourth Amendment. Appellate decisions, which come years after the policeman had to make his decision, perhaps under difficult and trying circumstances, are couched in

²³See S. Schlesinger, *supra* note 9, at 50-57.

²⁴Canon, *Is The Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 726 (1974).

²⁵*Bivens*, 403 U.S. at 416 (Burger, C.J., dissenting).

²⁶*Id.* at 420.

language sometimes unintelligible to lawyers, and have no personal impact on the policeman whatsoever. The basic responsibility for guidance, accompanied by a meaningful system of sanctions, should be placed early in the policeman's corrective educational process, i.e., within the administrative system.

C. Make Sure the Criminal Goes to Jail, Even if the Constable Blunders

This most visible and most irrational result of the rule must be corrected. After viewing almost seventy years of the American experience, no other civilized nation has adopted it, which in itself is a damning indictment of its purported value. Its irrationality is apparent to lawyer and layman alike. So long as it continues in any aspect, the judicial system will be viewed with disrespect.

D. Offer a Remedy to Innocent Victims

No outrage by the police can be redressed by the rule. Only the guilty now profit. Surely the innocent victims of illegal searches are deserving of an effective remedy.

E. Introduce Comparative Values into the System of Discipline to Replace the Present Totally Arbitrary Process and Inflexible Penalty

No other system of criminal justice would, and our own does not elsewhere, tolerate the completely indiscriminate results of the rule. The value of the rights invaded and the degree of culpability of the officer must be put into the balance in every individual case. "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."²⁷

F. Make the Fourth Amendment Protection against Unreasonable Searches and Seizures a Practical Reality

Reform measures directed to the first five objectives above, far from diminishing Fourth Amendment protection, will actually enhance it.

²⁷*Id.* at 419.

IV. REMEDIES — ALTERNATIVES TO THE EXCLUSIONARY RULE

Despite the rhetoric of some who seem to be more enamored of the exclusionary rule — and its so frequent result of letting an accused go free — than the Fourth Amendment protection itself against unreasonable searches, the Supreme Court has made clear that the argument over the exclusionary rule is a pragmatic, not constitutional, question. After having been first based on property,²⁸ then briefly on privacy,²⁹ with overtones along the way of preserving “judicial integrity,”³⁰ by 1965³¹ and repeatedly in later cases it has become clear that the exclusionary remedy rests upon hoped-for deterrence of police misconduct. “Post-*Mapp* decisions have established that the rule is not a personal constitutional right,”³² hence the rule is to be evaluated by an estimate of its success in achieving deterrence. “The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it.”³³

Since the Court has never made an effort whatsoever beyond Justice Murphy's 1949 footnote to establish an empirical foundation for what is admittedly a pragmatic analysis, it is not surprising that the Court itself has for over ten years seized every opportunity to limit the application of the rule and that numerous proposals have been made there and in other quarters for its total or partial abolition.³⁴

Chief Justice Burger spoke eloquently in dissent in *Bivens* calling for its abolition when a workable alternative was in place; on the same day Justice Harlan in *Coolidge* called for a thorough reappraisal of the problem.³⁵ Justice Rehnquist joined the position of the Chief

²⁸*Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383 (1914).

²⁹*Mapp v. Ohio*, 367 U.S. 643 (1961).

³⁰“ . . . I think it a less evil that some criminals should escape than that the Government should play an ignoble part.” *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (only 14 years after *Weeks*). Since Holmes took so strongly a pragmatic approach to the law (see note 5 *supra*), I would like to have his comment now, after 54 more years of experience with the exclusionary rule.

³¹*Linkletter v. Walker*, 381 U.S. 618 (1965).

³²*Stone v. Powell*, 428 U.S. at 486.

³³*Id.* at 489.

³⁴In 1971, in *Coolidge v. New Hampshire*, 403 U.S. 443, 490-91, Justice Harlan wrote: “[I]t is apparent that the law of search and seizure is due for an overhauling. . . . I would begin this process of re-evaluation by overruling *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Ker v. California*, 374 U.S. 23 (1963). . . . [T]he assumed ‘deterrent value’ of the exclusionary rule has never been adequately demonstrated or disproved.”

³⁵See notes 4 and 34 *supra*.

Justice in *California v. Minjares*,³⁶ and Justices Powell and Blackmun have repeatedly expressed their doubts as to the efficacy of the rule.³⁷ So has Justice White.³⁸

Congressional critics of the rule have attempted to offer constructive alternatives — among others, Senator Bentsen in 1971 and 1973,³⁹ Congressmen McKay and Steiger in 1972 and 1975,⁴⁰ Senators DeConcini, Hatch, and Thurmond, Representatives Collins and Beard in 1981.⁴¹ The Attorney General's Task Force on Violent Crime likewise has proposed a drastic limitation on the rule in its final report issued 17 August 1981. Scholars such as Inbau, Oaks, Schlesinger, Wigmore, and C. A. Wright, among others, have called for its abolition (or drastic limitation) and a more rational alternative. Many of these proposals seek to achieve either all or most of the objectives of reform listed above, usually by devices of discipline of the offending law enforcement officer and by creating a civil action for the aggrieved person against the government agency responsible for the officer's misconduct.

In the discussion below I shall first describe the features of the principal proposed alternatives, and then analyze the extent to which they eliminate the evils of the exclusionary rule listed in Part I above and achieve the objectives of Part III.

A. *The Proposed Alternative Enforcement Remedies*

1. Internal Discipline by the Law Enforcement Agency

Many law enforcement agencies, federal and state, now have disciplinary boards. Their creation could be made mandatory and their authority broadened by statute. A federal statute could establish

³⁶443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of stay).

³⁷*Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1976).

³⁸In his dissent in *Stone v. Powell*, 428 U.S. at 541-42, Justice White pointed out:

If the defendant in criminal cases may not recover for a mistaken but good-faith invasion of his privacy, it makes even less sense to exclude the evidence solely on his behalf. He is not at all recompensed for the invasion by merely getting his property back. It is often contraband and stolen property to which he is not entitled in any event. He has been charged with crime and is seeking to have probative evidence against him excluded, although often it is the instrumentality of the crime. There is very little equity in the defendant's side in these circumstances. The exclusionary rule, a judicial construct, seriously shortchanges the public interest as presently applied.

Justice White's observation here is also relevant to the discussion in Part IV.B.3. *infra*.

³⁹S. 2657, 92d Cong., 1st Sess. (1971); S. 881, 93d Cong., 1st Sess. (1973).

⁴⁰H.R. 17096, 92d Cong., 2d Sess. (1972); H.R. 5628, 94th Cong., 1st Sess. (1975).

⁴¹S. 101, S. 751, H.R. 4606, H.R. 4259, 97th Cong., 1st Sess. (1981).

one disciplinary board for all law enforcement agencies in the Justice Department, another for those in the Treasury, and another for any other federal agencies exercising law enforcement functions. Complaints before the disciplinary boards could be initiated by the victims of illegal searches (whether guilty or innocent), or by District Court judges; United States Attorneys could be required to report possible violations coming to their attention to the disciplinary boards for investigation and decision. The boards could be empowered not only to discipline the officer but to reimburse victims from the enforcement agency's own annual appropriation, which would exert some compulsion on the agency not only to discipline erring officers but to train them so the errors would not be repeated.

It should be noted that no system of internal discipline could possibly work unless the exclusionary rule were abolished at the same time, for the reasons set forth in I.C. (Cost 3) above.

2. External Control of Individual Law Enforcement Agencies by the Executive Branch

In *Exclusionary Injustice: The Problem of Illegally Obtained Evidence*⁴² Steven Schlesinger has argued ably for the establishment of an independent review board, in the Executive Branch but outside any individual law enforcement agency, to which complaints of law enforcement misconduct could be either brought by the victim or referred by a court after criminal trial. The independent review board could be made up of citizens, judges, law enforcement officers, and any other desired representatives.⁴³ Where a criminal prosecution resulted from the illegal search and seizure, the hearing on the officer's conduct would be held separate from the criminal trial of the accused. To encourage innocent victims of illegal searches to bring complaints against erring officers, a minimal but automatic compensation to the successful complainant could be used as an incentive.

3. External Control by a Civil Tort Action against the Government

In *Bivens* Chief Justice Burger suggested that Congress enact a statute which would waive sovereign immunity and create a civil action for damages against the Government itself where enforcement agents violated the Fourth Amendment. This civil statutory remedy would be in lieu of the exclusion of evidence, which would be affirmatively made admissible irrespective of whether obtained in violation

⁴²See note 9 *supra*.

⁴³It is doubtful that federal judges could serve in such capacity, but state court judges might not be prohibited from participation.

of the Fourth Amendment. The civil actions of this type would be brought before "a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims"⁴⁴

While the Chief Justice suggested a civil "action for damages sustained by any person aggrieved," Professor Schlesinger has urged the creation of a civil remedy for innocent victims only. If the officer's conduct were determined to be illegal, the innocent victim would recover at least a basic compensatory amount plus counsel fees without any showing of specific damage, and could recover more depending on the gravity of the officer's misbehavior. In contrast to standards relevant in a disciplinary proceeding directed against an individual officer, the innocent victim would recover irrespective of whether the officer acted in good or bad faith; the test of recovery would be the existence of a Fourth Amendment violation. Since the recovery would be against the government agency itself (preferably out of its regularly appropriated funds), not the individual officer, this would create a deterrent force operating on the law enforcement agency; it would also provide an economic incentive for victims and lawyers to expose many instances of police error or deliberate harassment which now never see the light of day because there is no remedy.

4. Judicial Control of Law Enforcement Conduct Separate from the Main Criminal Trial

I have previously proposed that after the principal criminal case against the accused there be a mini-trial of the police officer to determine the correctness of his conduct. One of the most disturbing flaws in the present exclusionary remedy is that by considering the legality of the officer's conduct it interjects into a criminal prosecution totally extraneous concerns and questions irrelevant to the guilt of the accused. If it were understood that the evidence would be admitted even if the search were found to be illegal, but that questions as to the officer's conduct could be litigated after the main trial was over, then the original trial would proceed on a straight course; any accused aggrieved by improper police conduct would have a chance to prove his case later, much as he does now on a motion to suppress. For the sake of judicial economy this should be done before the same judge and jury which heard the principal case.

The question of the officer's conduct would be determined on a simple preponderance of the evidence. If found improper, factors bearing on the officer's culpability would include the degree of willfulness demonstrated, *i.e.*, his "good faith"; the nature of his in-

⁴⁴*Bivens*, 403 U.S. at 423 (Burger, C.J., dissenting).

structions from his superiors; any exigent circumstances; the degree to which privacy and other rights of the injured party were violated; the societal values impinged upon by the officer's conduct; and any other relevant circumstances. Based on the degree of culpability shown, the judge would direct the agency to reprimand, fine, delay in promotion, suspend, or discharge. Whether the mini-trial should also be a vehicle to compensate a guilty victim of an alleged illegal search is a question which will be discussed below.

5. The "Good Faith" Exception

The so-called "good faith" exception to the exclusionary rule is a proposal that the courts continue to exclude evidence obtained by law enforcement officers acting in "bad faith," but admit any evidence obtained by officers acting in "good faith," even if in violation of the Fourth Amendment. This major modification has recently gained credibility through its adoption by the Fifth Circuit in *United States v. Williams* (1980)⁴⁵ and by Recommendation 40 of the Attorney General's Task Force on Violent Crime. The Task Force's key words were:

In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. . . . If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees.⁴⁶

B. Evaluation of Proposed Alternatives

1. Internal Discipline by the Law Enforcement Agency

Internal police discipline is the most simple and straightforward of all the proposed remedies. It is generally that protection relied upon in other civilized nations. It would lift the burden of law enforcement supervision from the courts (Reform Objective A above), and, if accompanied by the abolition of the exclusionary rule, it would send the criminal to jail, even if the constable blunders (C). In regard to reform objectives (B) and (E), reliance on internal police discipline would be an improvement over the present exclusionary remedy. Internal discipline certainly should provide more prompt and more effective guidance to the individual policeman than he gets from indecipherable appellate decisions years after the event (B). Surely internal discipline

⁴⁵662 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981).

⁴⁶Attorney General's Task Force on Violent Crime, U.S. Dep't of Justice, Final Report 54 (1981).

would abandon the blunderbuss, all or nothing approach, by introducing some concept of proportionality; first, in judging the officer's conduct, and then, if he were found deficient, in meting out a penalty (E).

Other reform objectives would not be achieved. Reliance on internal discipline of the individual policeman would not offer a remedy to innocent victims (D). As for making the Fourth Amendment protection against unreasonable searches and seizures a practical reality (F), if for one would not rely entirely on internal law enforcement discipline. The record of internal police discipline has not been entirely satisfactory. The policeman's life is a hard one, his decisions are made under difficult circumstances, and he in most cases can count on the sympathy of his fellow officers when he faces internal disciplinary proceedings. In comparison with the complaints against police and other law enforcement officers' abuse, the records of law enforcement agencies just do not show that many disciplinary actions taken. And, if any vestige of the exclusionary rule is retained in any form, even with the good faith exception attached, it is futile to count on any internal police discipline because it would have the effect of sabotaging the success of the prosecution. See Part I. C. above.

2. External Control of Individual Law Enforcement Agencies by the Executive Branch

Professor Schlesinger's proposed independent review board is one of the better examples here. As he points out, devices of this sort have achieved some success in local situations. My surmise is that where such boards have achieved success in controlling police excesses, that success has been proportional to their true independence, the caliber of the persons selected to serve, the financial backing given the system, and the legal clout conferred on the boards to make their decisions effective. Precisely how such an independent disciplinary review board could be set up in the large federal law enforcement system could be determined only after extensive study, but serious consideration of the proposal should not be foreclosed by that necessity. Perhaps the old Civil Service Commission and its present successors could serve as a partial model.

With regard to the enumerated objectives of reform, the same comments made with respect to internal police discipline would apply to objectives (A), (B), (C), and (E). It would be easier to integrate a workable and realistic remedy for victims of illegal searches (D) into an independent, as opposed to an internal, review board setup, although amending the Federal Tort Claims Act would probably be a simpler legislative solution. However, the economy of having an in-

dependent review board act upon the officer's conduct for both the purpose of disciplining him and at the same time awarding compensation to a victim should not be overlooked. For judicial economy, having the review board do both tasks would be preferable to having an additional action in a federal court under the Tort Claims Act. As for insuring Fourth Amendment protection realistically (F), the independent review board would appear far superior to reliance upon internal police discipline.

3. Civil Action by the Victim of the Illegal Search against the Government Agency

A federal tort action before a special tribunal was suggested by Chief Justice Burger in his dissent in *Bivens*. This, coupled with reliance upon meaningful police discipline, was urged by Professor Schlesinger for innocent victims of an illegal search. No matter what other action is taken this is the *only* measure which will offer a remedy to innocent victims of illegal searches (D). There are doubtless innumerable instances of illegal searches which are never noted in any statistics because they never result in prosecution. The victims of these illegal searches, which may sometimes constitute systematic harassment, rarely have any effective remedy. If the federal and the state governments are protected by sovereign immunity, and the average law enforcement officer does not have the financial wherewithal to pay, there is no incentive to bring a suit.

In addition to conferring a remedy on innocent victims (D), in my judgment the existence of an effective civil action remedy would act as a powerful deterrent (F). The civil action need not be brought against the individual officer. Indeed, it is arguable that it is better to leave the individual officer out of the civil action entirely,⁴⁷ and to give the aggrieved person the remedy against the governmental agency only in lieu thereof. This will enable the individual officer still to make the

⁴⁷See Justice White's comments, note 38 *supra*. The exclusionary remedy applies whether or not the officer involved acted in good faith. This is anomalous in view of the fact that an officer of the Executive Branch who acts in good faith is immune to civil liability. Thus, for example, a suspect whose innocence is later proved at trial cannot recover damages against the arresting officer if the arrest was based on probable cause. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Similarly, an officer is not liable for damages if he acts under a statute later held unconstitutional either on its face or as applied, provided at the time of his actions he reasonably believed the statute to be valid. *Id.* The rule generally is that officers of the Executive Branch are immune from liability whenever their actions are made in good faith and are reasonable in light of all the circumstances. *Scheffer v. Rhodes*, 416 U.S. 232, 247-48 (1974). The immunity of Executive Branch officials for the consequences of their good-faith reasonable actions is predicated on the assumption that "it is better to risk some error and possible injury from such error than [for such officials] not to decide or act at all." *Id.* at 242.

close calls as his judgment under the circumstances dictates, but at the same time bring home to his supervisors the necessity of making those close calls correctly in order to avoid agency liability. The damages awarded ought to come out of the agency's annual budget, making the deterrent even more effective than if it came out of the Government's general funds.

On first blush this civil remedy might be thought to add to the burdens of the courts (A), but to the extent it deterred officers from making illegal searches it would reduce the number of such cases coming into the court system, and thus would eventually lighten the burden. It would thus further make Fourth Amendment protection a practical reality (F).

An interesting policy choice arises as to whether a guilty victim of an illegal search and seizure should be allowed to bring a civil action, either separately in a court or before an administrative disciplinary board. Further, if the guilty victims of illegal searches are authorized to bring such actions, should they be allowed to keep the proceeds?

Some proposed legislation would allow the guilty victim to recover damages proportionate to the invasion of privacy he suffered, but at the same time force him to turn over those damages recovered to the victim of the crime for which he was convicted. This is an ingenious, indirect way of requiring the Government to compensate the victim of crime, at least where an illegal search and seizure by the law enforcement people intervenes. However, it is not clear why only victims of crimes who are lucky enough to have an illegal search and seizure by the police mixed up in their cases should alone get compensation from the Government. Nor is it clear what material incentive would be left for the criminal who himself is the victim of an illegal search, if he will be required to forfeit the proceeds of his own recovery. Other proposed measures would limit the recovery of any person who is convicted of the offense for which the evidence was seized in violation of the Fourth Amendment to actual property damage and personal injury.⁴⁸

The most valid argument for letting the guilty victim of an illegal search and seizure bring a civil action against the law enforcement agency is that not to do so violates the concept of *proportionality* so necessary in any civilized system of justice, much as the exclusionary rule does now (Costs 10 and 11, part I.D., *supra*). If a private house is ransacked from top to bottom, personal papers examined and even photographed, and as a result the only illegal or incriminating item seized is an unlicensed .22 target pistol, then by definition the pistol's possessor, if convicted of illegal possession of an unlicensed firearm,

⁴⁸S. 751, 97th Cong., 1st Sess. (1981) (Sens. Hatch & Thurmond); H.R. 2459, 97th Cong., 1st Sess. (1981) (Rep. Beard).

would be a "guilty" victim of an illegal search and thus barred from bringing a civil action. True, the police perpetrators of this search outrage would likely be disciplined, but the victim also deserves compensation, because the enormity of the police violation of the Fourth Amendment dwarfs the petty misdemeanor.

On the other hand, where the search victim's offense itself is of some magnitude, as carrying a sawed-off shotgun under circumstances indicating an intent to use in an armed robbery, and the officer's conduct at worst only marginally oversteps Fourth Amendment standards, then the search victim's recovery of damages might well be zero.

Whatever his chances of recovery, the guilty victim of an illegal search ought not be barred outright from bringing a civil action. He should have the same *right* to initiate an action as an innocent victim, although his ultimate *recovery* may be reduced by his own culpability. By such a civil action we would introduce a much needed concept of proportionality in search and seizure law between the "guilty" officer and the "guilty" victim, with the decisions made reflecting the community's balancing appraisal of the values denigrated by the conduct of each.

4. A Mini-trial After the Principal Criminal Case

At first glance this would seem not to lighten the burden on the courts (/), but in its practical working it probably would do so materially. When the accused no longer has the incentive of getting the principal evidence against him thrown out, or at least getting a greatly reduced sentence by plea bargaining, a great many frivolous claims of illegal searches and seizures will never be made. Only where there is a material and substantial violation will the accused and his lawyer take the trouble to insist that the court which has decided the principal case hear how the guilty criminal himself was abused by the police officers, and that the agency employing them be required to discipline them accordingly. The prosecuting attorney should also be under an obligation to call to the court's attention meaningful violations by the police, and, since this would no longer impede his own prosecution, he may be inclined to do so. Given any reliable source of information as to the officer's misconduct, including a charge by the defendant, the court would have an obligation to conduct a mini-trial after the main case. Petty slip-ups by the police would rarely invoke a complaint requiring a judicial judgment, but substantial violations of the Fourth Amendment would come to the court's attention and be acted upon. The court would then be in a position to order a proportionate disciplinary punishment for the erring officer.

Since the conduct of the officer would be handled in a proceeding separate from the trial of the accused, presumably it would get more careful scrutiny, and the decision of the court on this would serve as a more adequate guide to the police (B). Of course, with this mini-trial as a substitute for the exclusionary rule, the criminal will go to jail, irrespective of the constable's blunder (C). And, a mini-trial by the same court and jury (if a jury was employed in the principal case and the officer wants one) which heard the evidence in the original case is precisely the type of proceeding to introduce comparative values into the system of discipline, to replace the present totally inflexible penalty (E). The court's judgment on the infraction of the officer should reflect community values as to the standard of conduct expected of the police and as to the type of disciplinary punishment police should receive when they violate the standard. This would make the Fourth Amendment protection against unreasonable searches and seizures much more of a practical reality (F).

5. The "Good Faith" Exception

Like most other products of a committee, the Attorney General's Task Force recommendation on the good faith exception smacks of a compromise between the admittedly intolerable situation we have and the remedy truly necessary to correct it. Unlike many compromises, this one is the kind of compromise which may be as disastrous as trying to make the Grand Canyon in two jumps. The jumper is rarely able to summon the effort to make the second hop.

The proposed remedy has a certain plausibility, and it will have one favorable result: fewer guilty criminals will be set free by the application of the exclusionary rule. However, the guilty going free because the constable blundered is only the most visible of the many evils associated with the exclusionary rule. There are also evils which in the aggregate are greater than sometimes freeing the guilty criminal, *and each and every one of these is preserved by this proposed "remedy."*

Looking back at the list of existing evils in Part I above, it is clear that only the first evil will be partially corrected by the adoption of the good faith exception. *Each and every one of the other eleven listed evils will be retained after the proposed good faith exception remedy goes into effect.* For example, the good faith exception does not purport to give innocent victims of illegal searches and seizures any remedy at all; only the truly guilty will continue to benefit by the exclusionary rule (Cost 2). All internal disciplinary efforts of law enforcement agencies will be totally negated by the continued retention of the exclusionary rule in any form (Cost 3). The necessity to determine whether the officer acted in "good" or "bad" faith makes im-

possible any effective disciplinary remedy by either law enforcement agencies or outside review boards. Discipline of the officer will always undermine the prosecution of the case, if there remains any chance that the search can be found sufficiently illegal to invoke the exclusionary rule. The burden on the court is in no way lightened; it will still be necessary to determine in every criminal trial whether the officer acted in "good" or "bad" faith (Cost 4). This is now and will continue to be an unabated waste of judicial resources (Costs 5 and 6). The necessity of determining good or bad faith will be an outright encouragement to perjury, even as now (Cost 7); similarly, the retention of the rule for "bad faith" searches makes hypocrites out of judges (Cost 8). We could go down the list of remaining evils listed and see that each and every one would still be present if the proposed good faith exception is adopted.⁴⁹

In addition to perpetuating the present evils, the proposed good faith exception will create two additional evils:

Cost 13: The "good faith" exception puts a premium on ignorance and lack of training in law enforcement agencies. The ideal police recruit will be the "noble savage" who never heard of the Constitution. He will be able to do many illegal things in perfect "good faith."

Cost 14: After having been condemned for 67 years as an aberration in the judicial system, the exclusionary rule will finally be enshrined by legislation. Once the "good faith" exception rule is adopted, we will have the "bad faith" exclusionary rule with us at least for the lifetime of those of us concerned with it now.⁵⁰ As I said above, in making the Grand Canyon in two jumps, it is always the second hop that is the most difficult.

C. Statutory Correction

There are proposals in Congress to provide for strict internal discipline of federal law enforcement agencies for Fourth Amendment violations, and to provide a meaningful tort remedy against the Federal Government itself for all or only the innocent who are victimized by illegal searches and seizures.

My own conclusion is that the ideal statutory solution would be a measure which does three things. First, it should create an indepen-

⁴⁹Cost 11, lack of proportionality in regard to the officer's conduct, will be somewhat mitigated. Failure to consider whether the officer acted in good faith is one of the factors now demonstrating the arbitrariness in the inflexible application of the exclusionary rule. Taking the officer's good faith into account does reduce the arbitrariness of the total application of the rule.

⁵⁰The number of guilty going free will be reduced (there is enough "good faith" among the officers to justify this), but since the other evils of the rule are not so obvious to the layman as to evoke strong protest, the impetus for reform will have been lost.

dent review board, somewhat along the lines advocated by Steven Schlesinger, outside the control of any law enforcement agency. This would be similar to a specialized Civil Service Commission, dealing only with alleged violations of law enforcement officers, conducting hearings at which the officer and his accusers would be represented by counsel, and rendering a decision enforceable against both the officer and the agency. If the officer is found guilty of an infraction, then his punishment must fit the degree of his culpability. Knowing and willful breach of established rules and procedures would be dealt with severely; offenses in those areas where privacy must be inviolate — in the home, and with regard to private papers and effects — would likewise be dealt with severely. The established "good faith" of the officer, whether because of his lack of training,⁵¹ lack of clarity in the procedural rules, or the difficulty of the choice of courses of action he was required to make under the circumstances, would always be taken into account. The punishment meted out to the officer would range from a specified additional training course, much as we send traffic violators to driving school, to dismissal from employment. Penalties against the agency might embrace a required training course for all agents to correct deficiencies observed in that agency's employees.

Second, because victims of illegal searches deserve compensation, and because of the deterrent effect on the individual policeman and the agency, there should be created a civil action against the responsible government agency as a twin to the disciplinary proceedings described above. I would favor doing this by a simple amendment to the Federal Tort Claims Act, and permit the action to be brought in federal court as all other tort claims. I do not believe, for the reasons stated above in Part IV.B.3., that this would constitute a very large burden on the federal courts. However, its very existence would act as a deterrent, and in the cases in which the civil suit was justified the relief would be available and should be generously applied.

Third, the same statute should abolish the exclusionary rule in the federal courts.⁵² The Supreme Court has emphasized repeatedly and

⁵¹This might appear to be open to the same objection (Cost 13 above) which I raised to the "good faith" exception to the exclusionary rule. See p. 28, *supra*. However, where lack of training is invoked in defense of an officer, (1) it should be considered only one time, and (2) either the review board or the court in a mini-trial should have the authority to order the employer agency to give, not only the officer or officers involved but also all others similarly situated, remedial training.

⁵²This would leave *Mapp* in effect as to the states, until individual states adopted systems equivalent in deterrent effect (not necessarily identical) to the federal system. Conceivably, some states (I would say misguided states) might wish to retain the exclusionary rule. They would be free to do so, at least until experience proved that the new federal system was superior in creating a meaningful deterrent to violations of the Fourth Amendment.

recently that the only rationale for the exclusionary rule is the supposed deterrent effect on the conduct of police. If a viable law enforcement disciplinary system were in effect, supplemented by a meaningful tort action against the Government itself as an additional deterrent, then the Supreme Court would have no rationale for continuing the exclusionary rule as a deterrent. Certainly the High Court would be hard put to justify *not permitting* the political branches to put into effect a well-considered system of measures to deter violations of the Fourth Amendment; surely the American people are entitled to a chance to compare the effectiveness of these measures in place of the exclusionary rule before the Court passes any adverse judgment on them.

I realize that the mythology of the exclusionary rule — principally its confusion with the Fourth Amendment itself as constitutionally or divinely inspired — may create considerable political difficulties in abolishing the exclusionary remedy completely. If the political difficulties prove insuperable, then I would favor the enactment of the disciplinary procedure and the tort claims remedies discussed above, with nothing said about the exclusionary remedy at all. It is my belief that a majority of the Supreme Court is now so disillusioned with the demonstrated lack of deterrent effect of the exclusionary rule and its baleful influence on the entire system of justice that, given the creation of a viable alternative which creates a meaningful deterrent, the Supreme Court will abolish the exclusionary rule on its own volition and leave the discipline of law enforcement agents to the Executive Branch where it belongs.

D. A Test Case

If satisfactory legislation cannot be obtained, there is still another alternative within the judicial system itself. The Department of Justice should seek out the proper case and the proper jurisdiction to ask a district judge (a courageous district judge) to implement the proposed mini-trial for the discipline of the officer after the principal criminal case is completed, as discussed under part IV.A.4. and IV.B.4. above. The district judge should announce that he will reserve judgment on the motion to suppress until after the principal case is completed; that he will admit the evidence allegedly obtained by the misconduct of the officer in the principal case against the accused; but after the verdict is in, that there will be a hearing on the conduct of the officer. In the event of a conviction, if the officer's actions were *not* in violation of the Fourth Amendment, the conviction will stand, as is the present practice. If the officer's actions *did* violate the Fourth Amendment,

then the conviction will still stand, *but only if* the responsible law enforcement agency takes disciplinary action against the erring officer and reports back to the court within a limited time as to the nature of the action taken. If the judge deems the disciplinary action sufficient — sufficient in that it will not only punish this officer but serve as a deterrent to future similar violations — then the judge will let the conviction stand. If the judge deems the punishment or the deterrent insufficient, the judge will then grant the motion to suppress and exercise his unquestioned power to set aside the conviction on the grounds that the evidence should have been excluded.⁵³

The above procedure is a clearly responsible action for a district judge to take, to create a meaningful direct deterrent on the officer and the agency which violated the Fourth Amendment. If such a procedure is implemented, I predict that while some intermediate court of appeals might not sustain the action of the district judge, feeling it was bound by previous precedents of the Supreme Court, the Supreme Court itself would leap at the chance to validate the district judge's action in creating a new and viable effective deterrent to police action violating the Fourth Amendment.

E. Appellate Review

Throughout the above discussion I have dealt with the methods of enforcing the Fourth Amendment, not with what constitutes an unreasonable search and seizure. These are two separate questions. There is no intent to shut out the Supreme Court or the lower courts from a review of cases in which the latter question will be determined, although I have no doubt that this country does not need the volumes vast of search and seizure cases, which now make up so much of our criminal law, in order to keep the guidelines current on what is a reasonable or unreasonable search and seizure. No other civilized nation has anything like our litigation on search and seizure, simply because no other country has the exclusionary rule.⁵⁴

⁵³The disparity between the number of search and seizure cases in American courts and in those of other civilized countries is astonishing. The disparity can only be attributed to the extraordinary windfall incentive given the defendant by the total exclusion of evidence under the exclusionary rule. In 1969 in his *Two Studies in Constitutional Interpretation*, while dealing chiefly with the distinction between warrant and warrantless searches, Telford Taylor wrote:

Neither in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century. When the power was then belatedly contested, as we shall see, the English courts gave the point short shrift.

Id. at 29 (footnote omitted).

... [Lord Camden's] strictures on searches for evidence — as distinguished from his

If the above suggested reforms are put in place, there will be two types of issues to be reviewed: (1) the officer's action versus the accused defendant, and (2) the court or agency action versus the alleged offending officer.

First type of action is what courts review now on motions to suppress. These will continue, but we hope in greatly reduced volume. The issue of the reasonableness of the search will arise and be determined at the mini-trial or motion to suppress hearing after the principal criminal case is concluded; the issue will also arise in the civil suit by the victim of the search versus the government agency. Without any additional legislation, appellate review will be available in the usual form at the initiative of the losing party, *i.e.*, the defendant or the Government, or the Government or the victim of the search, will be able to appeal, as now. The issue of reasonableness will also arise in an independent review board proceeding. If such is created, provision should be made in the same statute for appellate review of the board's determination of this constitutional question, to avoid creating in the administrative process a body of search and seizure law which differs from Supreme Court standards.

The second type of action, court or agency versus the alleged offending officer, presumably could be given the same appellate review we now have for judicial or administrative personnel action cases. If the officer's guilt and punishment were decreed or approved by the district court, the review would be by the court of appeals. If the Government wished to contest the district court's determination that the search was unreasonable, that would be litigated in the same appeal with the officer, who might challenge both the determination on the search issue and his own punishment.⁵⁴ If the officer's culpability and penalty were assessed by an independent review board, the statute should provide for an appeal to the courts on the issues of the reasonableness of the search and due process in the administrative hearing; the proportionality of the penalty assessed against the officer should not be judicially reviewable.⁵⁵

condemnation of general warrants — left no mark on the law of England. For lack of an exclusionary rule, English case law in this field is sparse, but in both of the only two important post-*Entick* decisions, seizures of purely evidentiary documents were sustained. *Id.* at 61 (citing 1887 and 1934 cases) (emphasis added).

⁵⁴At this point the reader should try to recall how many police discipline appeals he has encountered in the case reports, or how many he has read about in the press, in which the officer was disciplined for violating the Fourth Amendment. Under the sway of the exclusionary rule, this just does not happen.

⁵⁵Indeed, appellate review of the district court in action after a mini-trial could be so limited.

With this degree of judicial review available to the defendant, the government agency, and the individual officer, there is little chance that the appellate courts would be deprived of enough cases in which to rule on the reasonableness of search and seizure. Thus, given the litigious character of the American populace, the lines between reasonable and unreasonable searches and seizures would continue to be drawn by the highest courts, and, with the distortions induced by the exclusionary rule out of the way, with greater logic and clarity.

V. CONCLUSION

In my judgment the statutory remedy outlined in IV, C. above is the preferable solution. It accomplishes the six objectives listed in III, which a viable alternative to the exclusionary rule should accomplish. The twin deterrents, an effective disciplinary action against the officer and a meaningful tort remedy against the Government, are both needed to accomplish all six stated objectives. The *complete* abolition of the exclusionary rule, so that no longer will the criminal go free because the constable has blundered, is likewise an essential element of any reform program. Whether this is done by statute or by the Supreme Court, itself, once the disciplinary and tort remedy features are in place, is principally a matter of political judgment, *i.e.*, the judgment of responsible lawmakers as to the situation in Congress and in the Supreme Court.

The judicial remedy, the mini-trial after the principal criminal case is completed against the accused (IV, D.), is a highly desirable alternative if the statutory reform cannot be achieved. It would accomplish nearly all of the above six objectives for reform, except that some residue, but only a small residue, of burden would be left on the courts, and there still would be no meaningful remedy for innocent victims of illegal searches. The frivolous motions to suppress on the grounds of an illegal search and seizure which now plague the judicial process would be virtually eliminated, as it simply would not be worth the time of defense counsel to make frivolous charges if there was no chance that even success would result in springing his client. Flagrant violations probably would be pressed by defense counsel, and if they were not, then other sources, including the prosecuting attorney, should inform the court. No matter what the source of the information, if credible, the trial judge himself should insist on a hearing on the officer's alleged misconduct.

We appear to be living in the Golden Age of crime. Indisputably, crime does pay. It pays so well because convictions are so difficult to

obtain. This is especially true for the most lucrative aspects of organized criminal activity — gambling, narcotics, and large-scale violent robberies. It is precisely in these areas where the exclusionary rule has its most baleful effect. The American public is well aware of these deficiencies; our entire system of justice has been brought into disrepute. There is a strong sense in the public, in the Congress, and in the Administration that now is the time to correct some of these most glaring distortions in the administration of justice. The exclusionary rule is a fine place to begin.

Other publications of the National Legal Center for the Public Interest include alternate quarterly issues of the National Legal Center NEWS and the LEGAL ACTIVITIES REPORTER. A tri-monthly publication entitled the "JUDICIAL/LEGISLATIVE WATCH REPORT" updates legislation and activities affecting the judiciary and judicial system.

Monographs include "FREE SPEECH AND THE CORPORATION" by Prof. Walter Berns; "COUNTDOWN 1984: A REVIEW OF FEDERAL GOVERNMENT 'MINORITY' GROUP PREFERENCE IN SMALL BUSINESS & PUBLIC WORKS PROGRAMS," by James H. Wentzel with preface by Dr. Sidney Hook; and "THE COMPETITIVE BIDDING PROCESS—AN ENDANGERED SPECIES?" by G. Brockwell Heylin, with an introduction by Ernest B. Hueter.

The proceedings of NLCPI's first national conference were published in 1978, with second printing in 1980 of the book, "THE JUDICIARY IN A DEMOCRATIC SOCIETY" by Lexington Books Division of D.C. Heath & Company. The proceedings of the fourth national conference, on "WORKERS' COMPENSATION & WORKPLACE LIABILITY," and the *Final Edited Proceedings* of the conference were published. "FINAL PROCEEDINGS" of the fifth NLCPI national conference, on the topic of "PRODUCT LIABILITY & TORT LAW REFORM," will be published in mid-1982.

Occasional papers on diverse topics have been circulated including "LEGAL PRIORITIES AFFECTING THE DEVELOPMENT OF ENERGY RESOURCES IN THE ROCKY MOUNTAIN WEST," by James R. Richards, Esq.; "ESSENTIALS OF A VIABLE ENERGY POLICY," by Dr. Miro M. Todorovich; "AFFIRMATIVE ACTION IN UNIVERSITY FACULTY EMPLOYMENT AS AN IMPERMISSIBLE ABRIDGEMENT OF CIVIL RIGHTS" by John Finley, Esq.; and "OVERVIEW OF LEGAL DEVELOPMENTS ARISING UNDER OSHA" by Anthony Obadal, Esq.

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"The right of the people to be secure . . . against unreasonable searches and seizures . . ." guaranteed by the Fourth Amendment is a precious right. Some 67 years ago, the Supreme Court held that evidence obtained in a forbidden search could not be received in evidence in a federal criminal trial. In this perceptive and positive monograph, Judge Malcolm Richard Wilkey presents the case for abandoning this exclusionary rule in favor of other fairer and more effective methods of enforcing the fourth Amendment.

—From the Preface by
Charles F. Barber, Chairman
National Legal Center
for the Public Interest

PREPARED STATEMENT OF YALE KAMISAR

Mapp v. Ohio,¹ which overruled the then twelve-year-old Wolf case² and imposed the Fourth Amendment exclusionary rule (the Weeks doctrine)³ on the states as a matter of Fourteenth Amendment Due Process, seemed to mark the end of an era. Concurring in Mapp, Justice Douglas recalled that Wolf had evoked "a storm of constitutional controversy which only today finds its end."⁴ But in the two decades since Justice Douglas made this observation, the storm of controversy has not only intensified -- but engulfed the Fourth Amendment exclusionary rule itself.⁵

It is now clear that once a provision of the Bill of Rights, such as the guaranty against unreasonable searches and seizures, is deemed "fundamental to the American scheme of justice,"⁶ it applies to the states to the same extent that it has been interpreted to apply to the federal government.⁷ Although some members of the Court have balked at "incorporating" a specific provision of the Bill of Rights into Fourteenth Amendment Due Process "jot-for-jot" and "bag and baggage," especially in the jury trial cases,⁸ this has come to be the prevailing view. Thus, critics of Mapp v. Ohio have had to direct their fire at the efficacy, validity and constitutional basis of the Fourth

NOTE.—Footnotes appear at end of statement.

Amendment exclusionary rule as well -- and they have done so with great force.⁹

Why the continuing storm of controversy over the exclusionary rule? Why the deep and widespread hostility to the rule? I think a recent "law office search" case, because it arose in a setting so unlike the typical search and seizure case, furnished a clue.

In O'Connor v. Johnson,¹⁰ St. Paul police obtained a warrant to search an attorney's office for "business records" of a client suspected of making false written statements in applying for a liquor license. The attorney happened to be present when the police arrived. Holding on to his "work product file," which contained some of the records sought, the attorney persuaded the police not to carry out the search.¹¹ He also persuaded them to accompany him to the chambers of the municipal judge who issued the warrant, so that he could move to quash it.¹²

When the lawyer applied to the state supreme court for a writ of prohibition to quash the search warrant, the municipal judge amended his order to the local prosecutor so that the judge himself, rather than a representative of the prosecutor's office, would determine which documents were unprotected and could be turned over to the police.¹³ The lawyer was not satisfied. He challenged the amended

order, again by writ of prohibition, and eventually prevailed.¹⁴

For me, the most remarkable feature of this extraordinary case¹⁵ is that the police never actually seized, let alone searched, the lawyer's work product file. Thus the courts were able to rule on the legality of the police action in an adversary proceeding before a search or seizure was carried out -- before anyone other than O'Connor knew what was in the file. Thus Mr. O'Connor did not need an "exclusionary rule" to effectuate his rights.

But O'Connor is not a typical search and seizure case.

Usually there is no way that a potential victim of unreasonable search and seizure can invoke "advance protection."

In this respect, freedom from unreasonable search differs from most other constitutional rights:

For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves.

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely behind the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search.¹⁶

In the typical case the courts do not enter the picture unless and until the challenged search has already turned up something incriminating. As a practical matter, nobody can stop the police from carrying out a search or seizure, if they are unwilling to be stopped, not even a lawyer. A good illustration is Mapp v. Ohio itself.

In Mapp, the police made two trips to defendant's house. The first time the officers demanded entrance, Miss Mapp, after telephoning her lawyer, refused to admit them without a search warrant.¹⁷ But twice as many officers returned three hours later -- again apparently without a warrant --¹⁸ and forcibly gained admittance.¹⁹ Miss Mapp's lawyer did arrive on the scene about this time, "but the officers, having secured their own entry... would permit him neither to see Miss Mapp nor to enter the house."²⁰ A widespread search of Miss Mapp's home failed to produce the gambling paraphernalia the police were

looking for, but did turn up alleged "lewd and lascivious" materials.²¹

If Miss Mapp's attorney had persuaded the police to accompany him to a judge's chambers, rather than carry out the search of Miss Mapp's home, the legality of the search would have been decided "in the abstract." If the judge had ruled that the police were proceeding unlawfully and had to abandon their course, we would never have known what evidence of crime, if any, the search would have uncovered. But as Mapp, and thousands of other cases, illustrate, this is not the way the system works.

Almost always the legality of a search is not contested in an adversary proceeding unless it has already produced incriminating evidence. Hence the strong need for the exclusionary rule. Almost always the court is asked to "unring the bell"²² -- to reconstruct events as though the damaging, often damning, evidence never existed. Hence the strong resistance to the exclusionary rule. The damaging evidence "flaunts before us the price we pay for the Fourth Amendment."²³

Why don't the requirements for obtaining search warrants furnish adequate "advance protection"? Because despite repeated announcements by the Supreme Court that warrantless searches are "per se unreasonable under the

Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions,"²⁴ the exceptions are neither well-delineated nor few.²⁵ The overwhelming majority of searches are made without a warrant.²⁶ One category alone, warrantless searches incident to arrest, "outnumber[s] manifold searches covered by warrants."²⁷ And the percentage of arrests made pursuant to a warrant is astonishingly small.²⁸ Moreover, even in the unusual case where law enforcement officials do seek a warrant, the judicial officer's participation is "largely perfunctory"²⁹ -- it is "notoriously easy"³⁰ to obtain search warrants or courts orders for electronic surveillance,³¹ and even easier to obtain warrants for arrest.³² Thus, almost always the first and only meaningful opportunity to decide the legality of a search or seizure arises after the fact.

It may well be that "many judges are reluctant to become truly involved in what they conceive to be a relatively ministerial task of issuing process,"³³ but maintenance of "only the fiction of before-the-fact judicial control [in] practice"³⁴ may stem as much, or more, from an incapacity to get "truly involved" in the warrant procedure as from an unwillingness to do so. As Professor Edward Barrett asked some fifteen years ago (and undoubtedly the numbers are even more striking today):

How can a magistrate be more than a

'rubber stamp' in signing warrants

unless he devotes at least some min-

utes in each case to reading the

affidavits submitted to him in support

of the request for a warrant, and

inquiring into the background of the

conclusions stated therein? And where

is the judicial time going to be found

to make such inquiries in the general-

ity of cases? The Los Angeles Municip-

pal Court with annual filings of about

130,000 (excluding parking and traffic)

finds itself so pressed that in large

areas of its caseload it averages but a

minute per case in receiving pleas and

imposing sentence. How could it cope

with the added burden that would be

involved in the issuance of warrants to

govern the approximately 200,000 arrests

made per year in Los Angeles for offenses

other than traffic?³⁵

The framers of the Fourth Amendment could hardly have
been expected to foresee the current state of affairs.

Two hundred years ago, no organized police forces had yet emerged. Relatively few arrests (and searches incident to) were made and probably only where there was "hot pursuit," "hue and cry," or an arrest warrant.³⁶ These arrests and "arrest searches" did not concern the framers.³⁷ Some common law warrants for stolen goods were issued by justices of the peace, but this "hybrid criminal-civil process" did not concern the framers either.³⁸ Indeed, because this hybrid process contained "elaborate safeguards against its improvident or abusive use, and provision for immediate confrontation of the alleged miscreant and his accuser before the magistrate,"³⁹ the framers sought to contain the use of general warrants along the lines of the relatively rigorous standards applicable to the old stolen goods warrants.⁴⁰

It is plain that what did concern the framers -- what almost completely dominated their thinking about searches and seizures -- were the general warrants and the writs of assistance.⁴¹

It is plain, too, I think, that when the framers prohibited these overreaching warrants they believed -- with good reason -- that the magistrates and judges would exercise vigilant before-the-fact control. Even after the Townshend Act of 1767 had disposed of all technical objections to the legality of the writs of assistance⁴² -- even "in the face

of mounting pressure from the executive -- which paid their salaries and could at any time remove them, or offer them preferment"⁴³ -- the judges of most of the colonies had either refused or ignored applications for the writs.⁴⁴ Surely an "independent judiciary" could be counted on to take seriously the command of the Fourth Amendment.

Surely it could be said especially of the people's right to be secure against unreasonable searches and seizures -- "the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England"⁴⁵ -- what James Madison said generally of the Bill of Rights in urging their adoption:

If [a bill of rights is] incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the

declaration of rights.⁴⁶

Although the Fourth Amendment establishes guidelines for the issuance of search warrants, it has nothing to say specifically about warrantless searches. This seems like a colossal oversight today, but it was understandable two hundred years ago.

In the first half of the eighteenth century, customs officials in Massachusetts (where most of the events concerning the writs of assistance occurred) had forcibly entered buildings by the mere authority of their commissions.⁴⁷ But when opposition to this practice grew, the Governor of Massachusetts found it necessary to issue writs of assistance.⁴⁸ When this practice, in turn, met criticism, the Governor directed customs officers to apply to the Superior Court of the province for writs.⁴⁹ In 1755 the Superior Court granted such a writ and thereafter continued to exercise this function.⁵⁰

As already pointed out, courts of most of the colonies resisted writs of assistance. This was not the case in Massachusetts, however, apparently because "a man pliable to the wishes of the monarchy" had been appointed Chief Justice of the Superior Court in 1770.⁵ But if the courts of Massachusetts did not resist the writs, the people did.

In the late 1760's "it became almost impossible to

enforce the writs: the populace gathered to thwart the efforts of the customs whenever they appeared."⁵² In 1769, after a group had forcibly recaptured goods seized under a writ,⁵³ a Boston merchant had successfully resisted customs officials with sword and pistol⁵⁴ and the seizure of John Hancock's sloop had caused a riot.⁵⁵ Chief Justice Hutchinson, the judge said to be "pliable to the wishes of the monarchy,"⁵⁶ wrote British authorities, who were pressing for the use of the writs, that he doubted whether any customs officer would venture any more to make a seizure.⁵⁷

If customs officers, although urged on by their British superiors, although armed with warrants issued by colonial courts specifically designated by the Townshend Act as the courts of issuance, grew unwilling, or at least most reluctant, to execute searches and seizures, would they do so without any statutory authority and without the authority of any judge or magistrate? Surely the framers of the Fourth Amendment should not be faulted for thinking they would not.

In light of the events preceding the Fourth Amendment, the argument that had the framers desired to exclude illegally seized evidence from criminal trials "they would have used plain appropriate language to say so"⁵⁸ is not

persuasive. One might as well argue, for example that --

If they had desired the police, whenever practicable, to obtain advance judicial approval of searches (and the Court has said they must),⁵⁹ the framers would have used plain, appropriate language to do so;

If they had meant that compliance with the first clause of the Fourth Amendment, i.e., existence of reasonable grounds, did not excuse noncompliance with the second, i.e., the warrant procedure (and the Court has said that it does not),⁶⁰ the framers would have used plain, appropriate language to say so;

If they had desired to test warrantless searches by the "probable cause" standard in the Warrant Clause, rather than by the more general proscription against "unreasonable searches" in the opening, general clause (and the Court has gone so far as to declare that "in a doubtful or marginal case [of probable cause] a search under a warrant may be sustainable where without one it would fail"),⁶¹ the framers would have used plain, appropriate language to say so;

If they had meant to allow the police to make felony arrests without warrant, even when they have ample opportunity to procure one, to conduct warrantless searches incident to arrest, even when there is no evidence or

fruits of the offense with which the arrestee is charged, and no reason to believe that he is armed or dangerous, to justify warrantless searches of the home -- even when the search is not incident to arrest and even when there is sufficient time to obtain a warrant -- on the "authority" of a third party's consent (and the Court has made it plain that the police may do all these things)⁶² the framers would have used plain, appropriate language to say so.

The likely explanation for the failure of the Fourth Amendment to provide explicitly for an "exclusionary rule" is that the framers thought little, if at all, about after the fact judicial control. (And if they did they probably thought there would not be much illegally seized material to be offered in evidence). The framers focused on, and placed their trust in, the warrant procedure. Justice Jackson put it well when he observed that the Fourth Amendment "roughly indicate[s] the immunity of the citizen which must not be violated, goes on to recite how officers may be authorized, consistently with the right so declared, to make searches," and then comes to an end, "apparently because [the framers] believed that by thus controlling search warrants they had controlled searches."⁶³

We know now, however, that the framer's trust in the warrant procedure was misplaced. We know now that so many searches are made without warrants that even if judges and magistrates had both the time and the desire to exercise vigilance in all of the relatively few cases in which warrants are sought they simply could not control searches by controlling search warrants.

The framers exaggerated the value of the warrant procedure, but it hardly follows that they exaggerated the evils that procedure was supposed to prevent. If the "guarantees of liberty written [into the Fourth Amendment] with the broadest latitude" are to endure as something more than "hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas"⁶⁴ -- if the experience of the framers is to be "carried down the stream of history,"⁶⁵ our courts must exclude the illegally seized evidence brought before them.

"The great tides and currents which engulf the rest of men," Cardozo once observed, "do not turn aside in their course and pass judges by."⁶⁶ At least they should not. In the 1960's the Court finally arrived at the conclusion that in a world of "parabolic microphones" (capable of eavesdropping on conversations taking place

in an office on the other side of the street) and laser beams (capable of picking sound waves off closed windows)⁶⁷ the protection against unreasonable search and seizure could no longer turn on whether the challenged invasion of privacy was accomplished by a physical invasion or "trespass."⁶⁸ To so limit the reach of the Fourth Amendment would be to read that Amendment "with the literalness of a country parson interpreting the first chapter of Genesis."⁶⁹ The Fourth Amendment "protects people, not places,"⁷⁰ observed the Court in the seminal Katz case;⁷¹ thus the command of the Fourth Amendment cannot be limited by "nice distinctions turning on the kind of electronic equipment employed."⁷²

Again in the 1960s, when police interrogators had long been carrying out the functions which historically the judiciary had performed before the emergence of organized police forces,⁷³ the Court finally held that the privilege against compelled self-incrimination and the right to counsel did apply to the proceedings in the police station as well as those in the courtroom. To continue to limit constitutional rights to criminal court proceedings when police interrogators were eliciting confessions from those likely to assume, or often led to believe, that they had to answer questions or it would

be so much the worse for them,⁷⁴ would again be to read the relevant constitutional safeguards with the literalness of the aforementioned country parson interpreting Genesis. Thus, in the famous Miranda case, the Court applied these constitutional safeguards to "informal compulsion exerted by law-enforcement officers during in-custody questioning."⁷⁵

Similarly, in an era when, as pointed out earlier,⁷⁶ it has become abundantly clear that the great bulk of searches and seizures are being made without any warrants (and there is ample evidence to believe that even in the relatively few instances where warrants are sought the magistrate's involvement in the process is "largely perfunctory"), the Court must keep pace with the realities of the criminal justice system. Because often, much too often, the legality of a search or seizure cannot be tested in any meaningful way before the fact, a defendant must be permitted to test it as soon as it is practicable to do so after the fact.

Otherwise a person could be convicted of a crime punishable by a long stretch in the penitentiary on the basis of a search or seizure whose legality had been judged solely by "judges of their own cause."^{76.1} Otherwise, "[t]he awful instruments of the criminal law" would be

"entrusted to a single functionary."⁷⁷ Otherwise the majestic Fourth Amendment would look like a huge whale stranded helplessly on the beach after the tide has gone out.

True, the Fourth Amendment does not contain a provision explicitly stating: No evidence obtained in violation of one's right to be secure against unreasonable searches and seizures shall be admissible in a criminal prosecution against him. But neither does the Fourth Amendment add: Despite the foregoing, however, if the police do make an unreasonable search or seizure, the produce of such search and seizure may be used in evidence in any trial, hearing or proceeding which the government may see fit to commence against any person whose rights have thus been violated.⁷⁸ Nor does the Fourth Amendment contain a proviso, and we should be slow to read one into it, stating: However, the decisions of government officials that a search or seizure was reasonable shall be final and conclusive in all criminal prosecutions in which the produce of a search or seizure is offered in evidence and no court shall have any power or jurisdiction in any such proceedings to consider or to review the legality of any such governmental action.⁷⁹

As the late Alexander Bickel "conceive[d] the

and admittedly a different case than Weeks, which established the federal exclusionary rule, but a theme that resounds throughout both opinions is the determination to take the Constitution seriously, to see that "its commands, and above all its promises, are to be translated into practice."⁸⁶

In Marbury, John Marshall deemed the doctrine that "courts must close their eyes on the Constitution and see only" the act of Congress⁸⁷ "subver[sive]" of all written constitutions. "It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual."⁸⁸

In Weeks the government asked the courts, in effect, to close their eyes on the Fourth Amendment and consider only the probative value of the evidence gathered by the police. The Weeks Court, it appears, viewed such a contention as subversive of the Amendment. It would mean, the Weeks Court seemed to think, that even though the police do what is expressly forbidden -- an exclusionary rule is not expressly required, but an unreasonable search is "expressly forbidden" -- the prohibited police conduct would be "in reality effectual."

Because the statute struck down in Marbury pertained to the jurisdiction of the Court itself, it need not have come

contest established by the First Amendment, and as the Supreme Court of the United States appeared to conceive it in the Pentagon Papers case,"⁸⁰ once the press gets hold of newsworthy documents, even though it is aware that they have been stolen, it may publish them "with impunity."⁸¹ As Professor Bickel read the First Amendment --

[T]he presumptive duty of the press is to publish, not to guard security or to be concerned with the morals of its sources.

Those responsibilities rest chiefly elsewhere. Within self-disciplined limits and presumptively, the press is a morally neutral, even an unconcerned, agent as regards the provenance of newsworthy material that comes to hand. . . .⁸²

This approach has been called "the law of the jungle,"⁸³ and if the exclusionary rule were abolished it would govern criminal prosecutions as well. This approach may be a defensible reading of the First Amendment, but not, I submit, of the Fourth. A criminal court is not (or at least it should not be) "a morally neutral, even an unconcerned, agent" as regards the provenance of relevant evidence that comes before it.

Marbury v. Madison⁸⁴ is a rather complicated case⁸⁵

to stand for the great principle it has. It might have been read more narrowly as "a defensive use of constitutional review alone, acquiring considerable support from the concept of separated powers"⁸⁹ -- as a "safeguarding" of the Court's original jurisdiction from congressional enlargement.⁹⁰ Marbury, of course, may no longer be read that way, but Weeks still can.

The courts, after all, are the specific addressees of the constitutional command that "no Warrants shall issue, but upon" certain prescribed conditions.^{90.1} If the police act pursuant to a defective warrant or, as is much more often the case, act without any warrant at all, and the produce of their action is offered in evidence, the court that reviews the legality of the search or seizure may be said to be exercising "a defensive use of constitutional review alone."

Because the courts are the specific addressees of the Fourth Amendment's command, it seems to follow, and the Weeks Court seemed to think it followed, that when the police come before them with the produce of their lawless searches the courts should defend judicial power against law enforcement encroachment. If "not even an order of court would have justified" the police action, as it would not have in Weeks, then "much less was it

within [the officers'] authority" to proceed on their own "to bring [proof of guilt] to the aid of the Government."⁹¹ And if the government's agents did proceed on their own "without sanction of law," as they did in Weeks, then the government should not be permitted to use what their agents obtained. The government whose agents violated the Constitution should be in no better position than the government whose agents obeyed it; "the efforts of the courts and their officials to bring the guilty to punishment. . .are not to be aided by the sacrifice of [Fourth Amendment] principles."⁹²

John Marshall to the contrary notwithstanding, a "judicial veto" of an act of Congress is not the inevitable consequence of our Constitution being a written one.⁹³ The Constitution, it has been pointed out, does not say that when judges give a different interpretation of the Constitution than the Congress, the latter is bound to yield to the former.⁹⁴ But a "judicial veto" of the police, it seems to me, is an inevitable consequence of the Fourth Amendment.

The "central objectionable feature" of both the general warrants and the writs of assistance was that "they provided no judicial check" on the discretion of the executing officials.⁹⁵ The Bill of Rights, especially the Fourth

Amendment, "reflects experience with police excesses."⁹⁶

A basic purpose of the Bill of Rights, especially the Fourth Amendment, is "subordinat[ing] police action to legal restraints."^{96.1} Critics of the courts, to be sure, have long criticized them for "policing the police." But as Professor Anthony Amsterdam responded, in his famous Holmes lectures on search and seizure, "the fourth amendment is quintessentially a regulation of the police" -- "in enforcing the fourth amendment, courts must police the police."⁹⁷

I can hear the opponents of the exclusionary rule now. We are not against subordinating police action to legal restraints, they are saying, we are only against doing so when the government seeks to use the fruits of the police illegality. This also happens to be the occasion when the defendant has the maximum incentive to challenge the police conduct and, if he is an indigent, as many criminal defendants are, the services of court-appointed counsel. No, say the opponents of the exclusionary rule, let us have no judicial check on the discretion of government officials in a criminal prosecution against the victim of the police illegality. Let the victim bring a private lawsuit -- if he is willing to rouse the police and able to find a lawyer willing to take on "a team of

professional investigators and testifiers,"⁹⁸ often without fee, and risk the chance of earning a reputation as "a police-hating lawyer."⁹⁹

I can hear the opponents of the exclusionary rule again: We don't want the courts to "close their eyes on the Constitution" permanently, they are saying -- only long enough to convict a person and send him to prison on the basis of evidence obtained in violation of the Constitution. Only long enough, I would say, to make the expressly forbidden act "in reality effectual."

If I may quote John Marshall in Marbury v. Madison another time, and for the last time, "the very essence of civil liberty," he told us, "consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."¹⁰⁰ Presumably he meant "claim[ing] the protection of the laws" at the first practicable opportunity. Moreover, although the police have already inflicted an injury if they have violated the Fourth Amendment, when the government tries to convict a person on the basis of the Fourth Amendment violation it seeks to inflict a second -- and much larger -- injury. Isn't the use of unconstitutionally seized evidence in a criminal prosecution against the victim of the police illegality "an exacerbation of a constitutional

injury"?¹⁰¹ Justice Holmes, at least, thought so. "If the search and seizure are unlawful as invading personal rights secured by the Constitution," he observed more than fifty years ago, "those rights would be infringed yet further if the evidence were allowed to be used."¹⁰²

If the courts may test the legality of the police conduct some time, isn't the logical time to do so during the criminal process, "a process initiated by government for the achievement of basic purposes";¹⁰³ "a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against"?¹⁰⁴ After all, American criminal procedure "imposes procedural regulations on the criminal process by constitutional command."¹⁰⁵ Why should the Fourth Amendment be an exception?

"The survival of our system of criminal justice and the values which it advances," observed the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice twenty years ago, "depends upon a constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process."¹⁰⁶ It is plain that the Attorney General's Committee meant the criminal process. If fast-developing situations and other exigencies of law enforcement work preclude meaningful challenge at the earliest stages of the criminal process,

why does it follow, how does it follow, that no meaningful challenge should be permitted at any stage of the process? Challenging the legality of a search or seizure at some stage of the criminal process -- when it is practicable to do so -- means the exclusionary rule. That's all the exclusionary rule means.

In a number of recent non-criminal procedural due process cases, the Court has reminded us that "[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions."¹⁰⁷ Although the Court has expressed a clear preference for pre-seizure hearings, it has recognized that there are "'extraordinary' situations" -- "'truly unusual' situations" -- that justify postponing notice and opportunity for a hearing."¹⁰⁸ "Only with great reluctance," however, "has [the] Court approved the seizure even of refrigerators or washing machines without notice and a prior adversary hearing."¹⁰⁹

Because a search warrant and, as is much more often the case, the execution of a search or seizure without a warrant serve "a highly important government need"¹¹⁰ and because "the danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if

given any prior notice,"¹¹¹ a search or seizure by the police is plainly one of those "extraordinary situations" that "justify postponing notice and opportunity for a hearing." But as the need for the police to act swiftly and by surprise creates the exception, "so it limits [or should limit] its duration."¹¹² Once the suspect is in custody and once the evidence has been seized, what justifies dispensing with an adversary hearing at every subsequent stage of the criminal process? Yet that would be the result if the "exclusionary rule" were to be abolished.



I am well aware that critics of the Fourth Amendment "exclusionary rule" disparage it as merely a judge-made rule of evidence. Thus, in his recent testimony before the Attorney General's Task Force on Violent Crime, Judge Malcolm Wilkey said of the exclusionary rule: "This rule of evidence does not come from on high. It's man-made, not God-given. . . .It's not even in the Constitution."

I must say this doesn't strike me as much of a point -- not, at least, unless someone can name me one Supreme Court decision or doctrine that is not "a matter of judicial implication," that was not, to use Judge Wilkey's phrase, "manmade."

What, for example, is the source of the constitutional rule -- first applied in 1936 -- barring the use of involuntary confessions, even though, as the Court made clear in the 1950s and 1960s, the confession is corroborated by physical evidence and hence trustworthy. Read the Constitution. It has nothing to say about "confessions," "involuntary" or "coerced" or otherwise. Is this rule any less a constitutional rule because it is "judge-made" or "judicially-created"?

Consider the reapportionment cases, the 1896 "separate but equal" case and the 1954 school desegregation case which overruled it, the school prayer and released time cases, the "clear and present danger" test, the "symbolic speech" cases, and the recent Richmond Newspapers cases, establishing the media's right of access to criminal court proceedings -- even though, as Chief Justice Burger recognized in his lead opinion, this important right is not explicitly defined or articulated in the Constitution.

Some years ago, when attending (as an observer) a conference of journalists, lawyers and judges, a conference characterized by much suspicion of, and hostility towards, the courts, Justice Potter Stewart could contain himself no longer. He leaped to his feet and asked:

Where, ladies and gentlemen, do you think
these great constitutional rights that

you were so vehemently asserting, and in which you were so conspicuously wallowing yesterday, where do you think they came from? The stork didn't bring them. They came from the judges of this country, from the villains here sitting at the table.

Well, I am perfectly willing to concede that the stork didn't bring the "exclusionary rule" either. But I am still waiting for someone to name me one constitutional rule, one constitutional case, the stork did bring. I think it worth recalling that the stork didn't bring the great principle established in Marbury v. Madison that the Supreme Court of the United States is the ultimate or supreme interpreter of the Constitution. This, too, is a matter of "judicial implication." One of our greatest judges, Learned Hand, insisted that there was "nothing in the United States Constitution that gave courts any authority to review the decisions of Congress." L.Hand, The Bill of Rights (1958). Indeed, observed Judge Hand, it could be forcefully argued that such a view of the Supreme Court's authority was inconsistent with the notion of separation of powers.

One of our leading authorities on constitutional law, Edward S. Corwin, once declared, "'The people who say the framers intended [judicial review over Congress] are talking

nonsense' -- to which he hastily added, 'and the people who say they did not intend it are talking nonsense.'" L. Levy, Judicial Review, History and Democracy: An Introduction, in Judicial Review and the Supreme Court 4 (1967). Adds Pulitzer prize-winning legal historian Leonard Levy: "A close textual and contextual examination of the evidence will not result in an improvement on these propositions." Id.

Justice Black was fond of contrasting the ambiguity of the Fourth Amendment with what he considered to be the clarity of the Fifth Amendment. Thus, in his separate opinion in Coolidge v. New Hampshire, 403 U.S. 443, 493 (1971), he observed that "the Fifth Amendment states in express, unambiguous terms that no person 'shall be compelled in any criminal case to be a witness against himself.'" Id. at 497-98. "The Fifth Amendment," he stressed, "in and of itself directly and explicitly commands its own exclusionary rule -- a defendant cannot be compelled to give evidence against himself."

But much constitutional law pertaining to the privilege is also a matter of "judicial implication." The Fifth Amendment, for example, does not define "compulsion" and many judges and distinguished commentators have argued that comment on the refusal of the accused to answer questions does not constitute "compulsion" within the meaning of the Fifth.

Indeed, both the Model Code of Evidence and the Uniform Rules of Evidence took this position. But the Supreme Court held otherwise in Griffin v. California, 380 U.S. 609 (1965).

The Fifth Amendment provides that "No person. . .shall be compelled in any criminal case to be a witness against himself." It is restricted on its face to criminal cases. But long ago the Court held that the protection of the Fifth Amendment applies to ordinary witnesses before a grand jury or a legislative investigating committee or even to someone in a bankruptcy or other civil proceeding. As historian Leonard Levy, perhaps our leading student of the privilege, has said of it: "Of no other clause in the Constitution has the Court declared that it cannot mean what it seems to say." L. Levy, The Right Against Self-Incrimination: History and Judicial History, in Judgments: Essays on American Constitutional History 265, 274 (1972).



Another argument made by opponents of the exclusionary rule, one related to the argument that the rule is merely a matter of "judicial implication," is the claim that the exclusionary rule is not grounded in the Fourth Amendment itself, but a judicially created rule of evidence that Congress might negate. The first hint of this appears in Wolf v.

Colorado, 338 U.S. 25, 33 (1949), where, after declining to hold that Fourteenth Amendment Due Process requires the exclusion of illegally seized evidence in state prosecutions, the Court, per Frankfurter, J., added: "And though we have interpreted the Fourth Amendment to forbid the admission of such evidence, a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the Weeks doctrine."

Justice Black had long maintained that the Fourteenth Amendment "totally incorporated" the Bill of Rights. Thus, he could not very well maintain that the Fourth Amendment of itself barred the use of illegally seized evidence, yet the Fourteenth Amendment, although it "incorporated" the substantive protection of the Fourth Amendment, did not bar the use of illegally seized evidence in state cases. Consequently, concurring in Wolf, he "agree[d] with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Id. at 40. The implication of the Court's opinion in Wolf was, however, anything but plain.

A year later, dissenting in United States v. Rabinowitz, 339 U.S. 56, 66-67 (1950), Justice Black reiterated that the federal exclusionary rule "is not a constitutional command,

but rather an evidentiary policy adopted by this Court in the exercise of its supervisory powers over federal courts."

Again, as he had in his concurring opinion in Wolf, Justice Black referred to McNabb v. United States, 318 U.S. 332 (1943).

McNabb was the first case to exclude evidence in the exercise of the Court's supervisory powers over the administration of federal criminal justice. But in doing so -- in throwing out confessions obtained from an "illegally detained" person "quite apart from the Constitution" -- the Court contrasted what it was doing with what the Court had been doing in the Fourth Amendment area. It noted that a federal conviction, "the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand" (id. at 339) -- citing Weeks and six other search and seizure cases -- but added that it was going to bar the confessions "quite apart from the Constitution."

McNabb, therefore, makes plain that the Fourth Amendment exclusionary rule is a command of the Fourth Amendment, not an exercise of the Court's supervisory powers over federal courts.

Moreover, nothing in Weeks nor in the many search and seizure cases that followed it in the next thirty-five years suggests that the Court had fashioned the exclusionary rule in the exercise of its supervisory powers. The Court was

interpreting the Fourth Amendment, nothing less. Thus, speaking for seven members of the Court (including Brandeis, who had joined the Court since Weeks, and Day, the author of the Weeks opinion) Justice Holmes observed in the 1920 Silverthorne case (251 U.S. 385, 391-92):

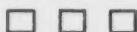
[The government's contention that] it may use the knowledge that it has gained [from the unconstitutional seizure] reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

Few members of the Court have ever read the Fourth Amendment more begrudgingly than did Chief Justice Taft. But speaking for the Court in the 1927 Olmstead case, Taft recognized that the meaning of the Fourth Amendment exclusionary rule, if not the Fourth Amendment itself, was plain. "The striking outcome of the Weeks case and those which followed it," he said, "was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the

Amendment" 277 U.S. 438, 462. (Emphasis added.)

Finally, what of Mapp v. Ohio itself? If the exclusionary rule is only an exercise of the Court's supervisory power over the federal courts, how did Mapp impose the rule on the state courts? The Court has no supervisory power over the states.

It may be that someday the federal exclusionary rule will be downgraded from a constitutional command to "a rule of evidence which Congress might negate." But if that day comes it will, to borrow language from Justice Frankfurter, "merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision" Cf. Frankfurter, J., dissenting in United States v. Rabinowitz, 339 U.S. 56, 75 (1950).



So far, I have said nothing about the efficacy (or inefficacy) of the exclusionary rule in deterring -- or reducing the incentive to commit -- illegal searches or seizures. One would never suspect this from the arguments of the opponents of the exclusionary rule or from recent opinions of the [Supreme] Court (see, e.g., United States v. Calandra, 414 U.S. 338, 347 (1974) ("the rule's prime purpose is to deter future unlawful police")), but nowhere in Weeks is the exclusionary rule called a "remedy" and nowhere in the

opinion is there a discussion of the effectiveness of the exclusionary rule versus the effectiveness of tort remedies or other alternatives. As Chief Justice Burger pointed out in a well-known article (although perhaps this part is not well-known), several years before he ascended to his present post, the Weeks case "rested on the Court's unwillingness to give even tacit approval to official defiance of constitutional provisions by admitting evidence secured in violation of the Constitution. The idea of deterrence may be lurking between the lines of the opinion but is not expressed." Burger, Who Will Watch the Watchman?, 14 Am.U.L. Rev. 1, 5 (1964).

Nor is the idea of deterrence expressed for the next thirty-five years -- in the interim between the Weeks case and the Wolf case. The Court that decided Weeks and the Courts that adhered to the Weeks doctrine in subsequent decades may have hoped or expected that the exclusionary rule would significantly influence police behavior, but there is no suggestion in these thirty-five years that the rule's survival depends on proof that it is having this effect. However discomfiting this may be to those who feel they must subject every problem to cost-benefit analysis, the basic scheme of reasoning on which Weeks and its progeny are based is fairly simple: a "condemnation" of unconstitu-

tional police conduct or a "refusal to 'sanction'" such misconduct; an unwillingness to let the government whose agents have violated the Constitution profit from its own wrongdoing. No need to measure the extent to which the rule has actually reduced the incentive to flout the Constitution. No need for empirical data at all.

I don't find this surprising. The Court began overturning state convictions based on "coerced" or "involuntary" confessions in 1936 and as early as 1949 it reversed three state convictions based on "coerced" but trustworthy confessions, trustworthy because they were corroborated by external evidence. See Watts v. Indiana, 338 U.S. 69 (1949) and companion cases. Suppose that in the 1950s or early 1960s, some twenty or thirty years after the first reversal of a state conviction based on an involuntary confession, the government had argued that empirical studies indicated that police interrogators were as lawless as ever and that therefore the Supreme Court should abandon its course and start letting in coerced but reliable confessions. Does anybody really believe the Supreme Court would have been persuaded by such an argument?

The states whose police obtained "involuntary" but independently corroborated and hence trustworthy confessions had not left the guarantee against objectionable interrogation

methods without other means of protection. Various state statutes, for example, made it a crime to refuse to permit a lawyer to see an arrested person or to prevent a suspect from consulting with counsel or to fail to notify relatives that a friend had been arrested. Other state statutes penalized officials who attempted to obtain confessions by threats or other unlawful means. And, of course, false imprisonment and assault were torts. But the Court never suggested that these various state criminal statutes and tort remedies might be alternatives to excluding coerced but reliable confessions.

A number of these "coerced confession" cases grew out of "dragnet" or mass arrests. Sometimes many persons were subjected to offensive police methods. But so far as I know in those cases where the statements were unconstitutionally obtained, but independently established as true, the Court never considered the possibility of admitting the confessions and remanding the defendants -- together with others who were also mistreated but never confessed -- to the remedies of private action and such protection as the internal discipline of the police might afford. Why do so when the police have violated the Fourth Amendment?

I believe that just as the rule against admitting coerced but reliable confessions does, the Fourth Amendment exclusionary rule rests on a principled basis rather than an empirical proposition. But I also believe that the rule does significantly affect police behavior. The best evidence of this, I think, is the response of law enforcement officials to the adoption of the exclusionary rule.

Thus, former New York City Police Commissioner Michael Murphy recalled, Judicial Review of Police Methods in Law Enforcement, 44 Texas L.Rev. 939, 941 (1966), that when Mapp was handed down, he was --

caught up in the entire problem of reevaluating our procedures [and] creating new policies and new instructions for the implementation of Mapp. [Supreme Court decisions such as Mapp] create tidal waves and earthquakes. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen. . . .

Why did Mapp necessitate "creating new policies?" What were the old policies like? Why did Mapp require retraining sessions from top to bottom. What was the old training like?

In theory, Mapp had nothing to say about the content of the law of search and seizure. In theory, Mapp did not reduce

lawful police powers one iota. What was a lawful search or seizure before Mapp still was. What were "exigent circumstances" excusing the need to seek a search warrant before Mapp still were.

Before Mapp was decided, the New York courts admitted illegally seized evidence largely on the premise that no exclusionary rule was needed because existing alternative remedies were adequate to effectuate the guaranty and illegal search and seizure. "The officer might have been resisted," Judge Cardozo had said thirty-five years before Mapp, "or sued for damages or even prosecuted. . . He was subject to removal or other discipline. . ." People v. Defore, 242 N.Y. 13, 19, 150 N.E. 585 (1926).

The police reaction to Mapp makes plain that the alternatives to the exclusionary rule were woefully inadequate. Otherwise, Mapp would not have had such a dramatic effect. Otherwise, the New York City Deputy Police Commissioner would not have said at a post-Mapp training session on the law of search and seizure (N.Y. Times, April 28, 1965, p. 50):

Before [Mapp], nobody bothered to take out search warrants. [Prior to Mapp] the U.S. Supreme Court had ruled that evidence obtained without a warrant -- illegally if you will -- was admissible in state courts.

So the feeling was, why bother?

The New York experience was hardly unique. A year after Mapp, Senator Arlen Specter, then a young Philadelphia prosecuting attorney, began a long article on the problems raised by that case by reporting that "[p]olice practices and prosecution procedures were revolutionized in many states [by Mapp]." Specter, Mapp v. Ohio: Pandora's Problems for the Prosecutor, 111 U.Pa.L.Rev. 4 (1962). One state judge, he noted, had characterized the case "as a 'hurricane' which 'swept over our fair land last June.'"

"Long standing police practices," indicated Mr. Specter, had been "violently uprooted." Id. at 45. Philadelphia police officers, "who for years had presented their evidence in court without any regard to how it had been obtained, could not understand the subtleties of what constituted a legal search and seizure." Id. at 5. The police needed time to "absorb the subtleties of probable cause and the requisites of a warrant." Id. at 45.

I must say I don't see how anyone can read Commissioner Murphy's remarks or Senator Specter's twenty-year-old law review article and claim that tort remedies and other alternatives to the exclusionary rule are all that is needed to breathe life into the Fourth Amendment or say that the exclusionary rule does not significantly affect police behavior.

If it does not, then why did law enforcement officials react to the adoption of the exclusionary rule as if the Fourth Amendment had just been written? Why did they develop training programs on the law of search and seizure after Mapp had been decided, but not before?

Opponents of the exclusionary rule have taken great comfort in Professor (now Judge) Dallin Oaks' 1970 study. That study relies on the high frequency with which motions to suppress were granted in Chicago gambling, narcotics and weapons cases to conclude that long after adoption of the exclusionary rule illegal searches and seizures continued to be commonplace in the enforcement of these offenses by the Chicago police. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970). But more recent and more comprehensive studies cast grave doubt on Oaks' conclusions about the exclusionary rule's inefficacy in affecting police behavior.

Thus, Professor Canon concluded, for years later that Chicago is "a gross exception to the national norm of granting suppression motions." Canon, Is the Exclusionary Rule in Failing Health?, 62 Ky.L.J. 681, 718 (1974). Canon's study of 65 cities indicates that in 60 percent of them motions to suppress were granted one tenth of the time or less. Id. at 722. Still more recently, an LEAA-sponsored

study of state felony cases in various jurisdictions found that evidence was excluded for due process related reasons in surprisingly few cases. See Brossi, A Cross-City Comparison of Felony Case Processing (1979).

Why is Chicago "a gross exception to the national norm"? For one thing, as Canon points out, "judges in Chicago have long been noted for their willingness to grant motions to suppress evidence" and "it is sometimes alleged that Chicago police habitually conduct vice raids in a manner that ensures that a motion to suppress will be successful." Canon at 720. To put it more bluntly, there is reason to think "that the Chicago police use illegal arrest and search as a harassment technique." D. Horowitz, The Courts and Social Policy 243 (1977).

Moreover, "Chicago prosecutors exercise little or no screening function for Fourth Amendment violations, so that many cases are prosecuted that rest on illegally obtained evidence." Horowitz 243. Yet there is reason to think that "prosecutorial screening may be the most effective way of enforcing the Mapp rule" -- the decision not to prosecute because the case is based on illegally seized evidence is "likely to be explained to police officers by prosecutors somewhat more often, more fully, more informally, and in more understandable terms than they are by judges granting

motions and dismissing indictments." Id. at 247. Fortunately, it is certainly the policy of some prosecutor offices "to 'educate' policemen." J. Skolnick, Justice Without Trial 201 (1966).

Of course, prosecutors "educate" police officers before the search or seizure as well as afterwards. In this connection, it is worth recalling that only two and a half months ago the Attorney General of Maryland, Stephen Sachs, told an audience of law professors (I was there and I took very good notes):

I have been a prosecuting attorney in one capacity or another for nine years -- and I know the exclusionary rule deters law enforcement officers. I know the rule deters -- every day, all day long.

Prosecuting attorneys are on twenty-four hour call to consult with members of various police units and IRS and FBI agents and other law enforcement officers ask prosecuting attorneys again and again, "If I make a search, will this evidence stand up?"

Similarly, last October Attorney General Sachs told this Subcommittee:

When an Assistant United States Attorney, for

example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better "make" on the car. . . or that he should apply for a search warrant from a magistrate and not rely on the "consent" of the suspect's kid sister to search his home -- the [exclusionary] rule is working. The principal, perhaps the only, reason those conversations occur is that the assistant [prosecutor] and the agent want the search to stand up in court.

Episodes like these are commonplace. It was part of the routine of every federal prosecutor with whom I worked.

A final point about empirical studies indicating that in some places at least the exclusionary rule does not "work" because a high percentage of motions to suppress are granted. Whether or not the rule works in some places, and it may not -- I think it fair to say that the efficacy of the rule depends on many factors such as "the type of offense involved, the particular police unit responsible for specific enforcement tasks, and the way in which local courts and lawyers handle search-and-seizure matters" (Horowitz 225) -- whether or not the rule works in some places is not our immediate concern.

The bills before us propose to replace or revise the federal exclusionary rule. Thus, the only relevant issue before us is whether the rule works in federal law enforcement.

If the percentage of motions to suppress is the measure of the exclusionary rule's success, as it was in the oft-cited Oaks study, there is strong evidence that the rule works very well in federal cases.

According to a study conducted by the General Accounting Office only three years ago for the then Senate Judiciary Committee Chairman, Edward Kennedy, a study which covered 38 representative United States Attorneys' Offices and analyzed 2,804 cases in which defendants were likely to file motions to suppress evidence, evidence was excluded as a result of a Fourth Amendment suppression motion in only 1.3 percent of the cases. As for the cases during the sample period which the U.S. Attorneys declined to prosecute, in only 00.4 percent of them was a search and seizure problem the primary reason. See Impact of the Exclusionary Rule on Federal Criminal Prosecutions, GGO-79-45, April 19, 1979.

□ □ □

Let me move on to another point. When, back in 1978, Senator Edward Kennedy invited me to comment on the exclusionary rule, I replied in part, relying on the famous

Holmes and Brandeis dissents in Olmstead, as follows:

(letter of March 9, 1978):

The rule has a great symbolic significance -- it demonstrates to the general public and to law enforcement officers alike that the courts are sufficiently committed to the principles of the Fourth Amendment that when the police themselves break the law they and other agencies of government will not be allowed to use the benefits which flow from the violation. Were it otherwise, it would be difficult for the average citizen -- and the average police officer -- to believe that the government really meant to forbid the conduct in the first place. Were it otherwise, the average citizen -- and the average police officer -- would have further reason to believe that our government is pervaded by self-seeking hypocrites.

Since I made these remarks, Professor Milton Lowenthal, who teaches police officer students at the John Jay College of Criminal Justice of the City University of New York, conducted an extensive interview of police attitudes concerning

the exclusionary rule.* According to him, "perhaps the most important consideration which emerge[d] from [his] study is the credibility factor." Lowenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L.Rev. 24, 38 (1980).

Continues Professor Lowenthal (id at 39):

[M]ost law enforcement officers accept the [exclusionary rule] as a necessary fact of life. Indeed, there is every indication that our police could not understand or respect a Court which would reverse itself on a matter that appears to be so fundamental. At the very least, the police would doubt the applicability of fourth amendment standards, regardless of any direct sanctions that might be imposed; for the American con-

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Professor Lowenthal conducted 90 interviews with police commanders on all levels, was a participant-observer on 40 tours of duty "concerning virtually all phases of police works" and held "countless interviews" with his police officer students, "with particular attention to those who work outside New York City." See Lowenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L.Rev. 24, 29 (1980).

stitutional tradition is such that our police have great difficulty believing that standards can have any real meaning if the government can profit from violating them.

The adoption of the exclusionary rule, observes Lowenthal, "probably had a significant effect on police behavior because it seemed to 'mean business' as a matter of law as much as because of any deterrent sanction which it may have imposed. By the same token, the removal of the exclusionary rule is likely to have the opposite effect." Id. at 30. Regardless of the tort remedies and other alternatives that may be provided in its stead, the police, Professor Lowenthal warns us, "are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all."

Id. Moreover --

police doubts are likely to be stronger now than they would be if the exclusionary rule had never been imposed. Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute

remedies may be applied." Id.

I would hope that this Subcommittee would keep Professor Lowenthal's findings in mind when it considers various proposals to replace or to modify the exclusionary rule. I would hope that this Subcommittee would also consider Professor Lowenthal's view, based on his many interviews with police officers, that limiting the operation of the exclusionary rule to "substantial" violations of the guaranty against unreasonable search and seizure "would effectively downgrade the fourth amendment by implying that violations of the fourth amendment do not matter unless they are flagrant in nature." Id. at 39.

□ □ □

I would like to end my testimony on a constructive note. Proposals to provide an effective tort remedy against lawless police are usually linked with proposals to abolish or to curtail the exclusionary rule. This need not be. There is no conflict between excluding unconstitutionally seized evidence in those admittedly relatively few instances where prosecutions are brought and suing lawless police in the many instances where their conduct does not produce any damaging evidence.

Judge Wilkey would disagree. He has said that "[s]o

long as we keep the [exclusionary] rule, the police are not going to investigate and discipline their own men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215, 218 (1978). Now, it may be my shortcoming, but I am unable to follow this reasoning.

Opponents of the exclusionary rule keep reminding us that the exclusionary rule has no direct effect in those large areas of police activity that do not result in criminal prosecutions -- such as arrest, illegal detention, confiscation as a punitive sanction or other kinds of police misconduct that fail to turn up any incriminating evidence. In these many instances, how can suing or disciplining lawless police "sabotage" prosecutions? There are no prosecutions. How can suing or disciplining lawless police "invalidate the admissibility of vital evidence" when the police misconduct has produced no evidence? Whatever the reasons for not disciplining or suing the police in this large category of cases, it cannot be the existence of the exclusionary rule.

Thus, I propose an effective civil remedy against the government for damages for unlawful searches or seizures as a supplement to (not as a basis for abolishing or narrowing the scope of) the exclusionary rule. Then let Congress review

this civil remedy two or three years later. If the civil remedy were to prove fairly effective, as well it might, then the case for at least significantly narrowing the scope of the exclusionary rule would be very strong. Indeed, it is not inconceivable that the availability of a vastly improved civil remedy would lead the Supreme Court on its own to repeal, or at least curtail, the exclusionary rule.

FOOTNOTES

1. 367 U.S. 643 (1961).
2. Wolf v. Colorado, 338 U.S. 25 (1949).
3. Weeks v. United States, 232 U.S. 383 (1914).
4. 367 U.S. at 670.
5. As Professor Telford Taylor has pointed out, "the Court's division in the [Mapp] case, sharp as it was, did not concern the merits of the exclusionary rule. The disagreement concerned only the federal dimension of the constitutional question: should the states be left free to apply or not to apply the exclusionary rule according to state law? That is the issue on which the justices divided, and there is not a word in [Justice Harlan's dissenting opinion] suggesting that the rule is intrinsically bad." T. Taylor, Two Studies in Constitutional Interpretation 20-21 (1969).

Although the Wolf Court, per Frankfurter, J., had declined to impose the exclusionary rule on the states as a matter of federal constitutional law, it did say of the federal exclusionary rule, 338 U.S. at 28: "Since [Weeks v. United States, 232 U.S. 383 (1914)] it has been frequently applied and we stoutly adhere

to it." The same day Wolf was handed down, Justice Jackson, who had joined the opinion of the Court in Wolf, stressed the need for the federal exclusionary rule, untroubled by any "inconsistency" in adhering to the federal rule yet allowing the states to admit illegally seized evidence: "[F]or local excesses or invasions of liberty are more amenable to political correction, the [Fourth] Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source." Brinegar v. United States, 338 U.S. 160, 181 (1949) (dissenting opinion).

6. Duncan v. Louisiana, 391 U.S. 145, ___ n.14 (1968).
7. See generally the cases extracted and discussed in W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 488-94 (5th ed. 1980).
8. See id.
9. See, e.g., Burger, C.J., dissenting in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411 (1971); Burger, C.J., concurring in Stone v. Powell, 428 U.S. 465, 496 (1976); Rehnquist, J., joined by Burger, C.J., dissenting from denial of stay in California v. Minjares, 443 U.S. 916 (1979); S. Schlesinger, Exclusionary Justice: The Problem of Illegally Obtained Evidence (1977); Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215 (1978).
10. 287 N.W.2d 400 (Minn. 1979) (en banc). See generally Bloom, The Law Office Search: An Emerging Problem and Some Suggested Solutions, 69 Geo.L.J. 1 (1980).
11. 287 N.W.2d at ____.
12. Id. at ____.
13. Id. at ____.

14. A unanimous Minnesota Supreme Court held that a warrant authorizing the search of an attorney's office is invalid when the attorney himself is not suspected of any wrongdoing and there is no indication that the documents sought will be destroyed. See id. at _____. Under these circumstances, held the state supreme court, law enforcement officials have to proceed by subpoena duces tecum in seeking documents held by an attorney. See id. at _____.
15. O'Connor "was the first state or federal appellate decision to consider directly whether an attorney's office legally is subject to search." Bloom, *supra* note 10, at 4.
16. Jackson, J., dissenting in *Brinegar v. United States*, 338 U.S. 160, 182 (1949). But on another occasion, Justice Jackson voiced serious doubts about the efficacy of the exclusionary rule. See *Irvine v. California*, 347 U.S. 128, 134-37 (1954).
17. 367 U.S. at 644.
18. See id. at 645.
19. Id. at 644.
20. Id.
21. See id. at 643-45.
22. Cf. *Maness v. Meyers*, 419 U.S. 449, 460 (1975) (compliance with an order to produce material which an attorney believes in good faith may tend to incriminate his client "could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released").
23. J. Kaplan, Criminal Justice 216 (2d ed. 1978).
24. *Katz v. United States*, 389 U.S. 347, 357 (1967), quoted in, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

25. See generally Haddad, Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause, 68 J.Crim.L. & C. 198 (1977). See also Weinreb, Generalities of the Fourth Amendment, 42 U.Chi.L.Rev. 47, 79 (1974).
26. See Model Code of Pre-Arrest Procedure, Commentary at 492-94, 521 (Official Draft, 1975) (hereinafter referred to as Model Code); L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 99-116 (Remington ed., 1967).
27. T. Taylor, *supra* note 5, at 48. See also Model Code at 521; L. Tiffany, D. McIntyre & D. Rotenberg, *supra* note 26, at 105.
28. In 1966, for example, of 171, 288 arrests made by the New York City police, only 366 were made pursuant to an arrest warrant. See Model Code at 493.
29. LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich.L.Rev. 987, 992 (1965).
30. Spritzer, Electronic Surveillance by Leave of the Magistrate: The Case in Opposition, 118 U.Pa.L.Rev. 169, 190-91 (1969).
31. Concurring in *Berger v. New York*, 388 U.S. 41 (1967) (striking down New York's electronic surveillance statute), Justice Stewart observed, 388 U.S. at ____:
 "The need for particularity and evidence of reliability in the showing required when judicial authorization is sought for the kind of electronic eavesdropping involved in this case is especially great. The standard of reasonableness embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion." But a decade later, in appearances before the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (National Wiretap Commission), "prosecutor after prosecutor, particularly on the

state level, testified that judges rarely exercise any meaningful control. From 1969 through 1976, only 15 applications have been denied, out of 5,563 federal and state applications. . . One prosecutor told the National Wiretap Commission, 'I have not found one judge who takes the time to read an ex parte wiretap application.'" H. Schwartz, Taps, Bugs, and Fooling the People 23 (1977, Field Foundation pamphlet). See also S. Dash, R. Knowlton, & R. Schwartz, The Eavesdroppers 44-45 (1959); Schwartz, The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order," 67 Mich.L.Rev. 455, 485-86 (1969).

32. See W. LaFave, Arrest: The Decision to Take a Suspect into Custody, 502-03 (Remington ed., 1965).
Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, in Police Power and Individual Freedom 11, 13 (Sowle ed. 1962). A court clerk may issue arrest warrants, at least for violations of municipal ordinances. Shadwick v. City of Tampa, 407 U.S. 345 (1972).
33. LaFave & Remington, *supra* note 29, at 994.
34. Id. at 993.
35. Barrett, Criminal Justice: The Problem of Mass Production, in The American Assembly, Columbia University, The Courts, the Public and the Law Explosion 85, 117-18 (H. W. Jones ed. 1965).
36. See T. Taylor, *supra* note 5, at 28, 39 (hereinafter referred to as T. Taylor).
37. See id. at 39-41, 43.
38. See id. at 24-25.
39. Id. at 27. See also id. at 24-25.
40. See id. at 41.

41. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 51-105 (1937); J. Landynski, Search and Seizure and the Supreme Court 30-48 (1967); Taylor at 35-46; Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 366, 398, 410 (1974) (and authorities cited therein).
42. The Act authorized the superior or supreme court of each province to issue writs of assistance. See N. Lasson at 69-70, 73.
43. J. Landynski at 37.
44. Id. at 36-37; N. Lasson at 72-73.
45. J. Landynski at 19.
46. Address by James Madison, House of Representatives (June 8, 1789), reprinted in The Mind of the Founder 224 (M. Meyers ed. 1973). As has been pointed out both in language and in spirit, the Court's approach to interpreting the Fourth and Fifth Amendments in Boyd v. United States, 116 U.S. 616, 635 (1886) and Weeks, 232 U.S. at 391-92, is much like Madison's in offering the Bill of Rights for adoption. See Mapp v. Ohio, 367 U.S. 643, 647 (1961), and the concurring opinion of Justice Black, id. at 662 n.8.
47. See N. Lasson at 55.
48. See id.; J. Landynski at 31-32.
49. See N. Lasson at 55-56.
50. See N. Lasson at 56; J. Landynski at 32.
51. J. Landynski at 33 (so describing Lieutenant Governor Thomas Hutchinson).
52. Id. at 36. See also N. Lasson at 68-72; T. Taylor at 38.
53. See N. Lasson at 68.
54. See id. at 68-69.
55. See id. at 72.
56. See text at note 51 *supra*.

57. See N. Lasson at 72.
58. [Katz, see also Coolidge, Berger]
59. [Terry, Chimel]
60. [Coolidge]
61. United States v. Ventresca, 380 U.S. 102, 106 (1965).
[But see 67 MLR 53-54]
62. [Watson, Robinson, Matlock]
63. Harris v. United States, 331 U.S. 145, 195-96 (1947)
(dissenting opinion).
64. Cf. Amsterdam, *supra* note 41, at 399.
65. Cf. Frankfurter, J., dissenting in United States v. Rabinowitz, 339 U.S. 56, 70 (1950). Rabinowitz was overruled, and Justice Frankfurter vindicated, in Chimel v. California, 395 U.S. 752 (1969).
66. B. Cardozo, The Nature of the Judicial Process 168 (1921)
67. See generally S. Dash, R. Knowlton & R. Schwartz, The Eavesdroppers 339-79 (1959); A. Westin, Privacy and Freedom 69-89 (1967).
68. Until Olmstead v. United States, 277 U.S. 438 (1928) and Goldman v. United States, 316 U.S. 129 (1942) were overruled, the Fourth Amendment applied only when electronic snooping was accomplished by a physical invasion or "trespass."
69. A Beisel, Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 32 (1955) (so describing Chief Justice Taft's interpretation of the Fourth Amendment in the Olmstead case).
70. Katz v. United States, 389 U.S. 347, 351 (1967).
71. 389 U.S. 347 (1967).
72. Justice Douglas had so argued, concurring in Silverman v. United States, 365 U.S. 505, 513 (1961). His view prevailed in Katz.
73. See Beisel, *supra* note 69, at 104; Kauper, Judicial Examination of the Accused -- A Remedy for the Third Degree, 30 Mich.L.Rev. 1224, 1235 (1932);

Morgan, The Privilege Against Self-Incrimination,

74. See Kamisar, Police Interrogation and Confessions 37-38, 195-97 (1980).
75. *Miranda v. Arizona*, 384 U.S. 436, 461 (1966).
76. See text at notes 25-35.
- 76.1 "But [law enforcement officials] should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *United States v. United States District Court*, 407 U.S. 297, 317 (1972).
77. "Experience [has] counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into separate parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." Frankfurter, J., for the Court in *McNabb v. United States*, 318 U.S. 332, 343 (1943), quoted with approval in *Gerstein v. Pugh*, 420 U.S. 103, 118 (1975).
78. In an effort "to expose the hypocrisy involved in a high-sounding proposal, which nevertheless permits the violation and the use of its fruits," one delegate to the New York State Constitutional Convention, the famous trial lawyer, Max Steuer, who favored an exclusionary rule, did propose such an addition to the protection against unreasonable search and seizure. See 1 New York Constitutional Convention, Revised Record 578-82 (1938).

79. Cf. *Johnson v. Robinson*, 415 U.S. 361 (1974), a suit challenging the constitutionality of a statutory provision denying certain veterans' educational benefits to conscientious objectors. The government argued unsuccessfully that the courts were deprived of jurisdiction over the action by 38 U.S.C. §211(a), which provides that "the decisions of the Administrator [of Veterans' Affairs] on any question of law or fact under any law administered by the Veterans' Administration. . .shall be final and conclusive and no. . .court of the United States shall have power or jurisdiction to review any such decision. . .". The Court held this provision inapplicable to actions challenging the constitutionality of veterans' benefits legislation, viewing it as aimed at prohibiting review only of "decisions of the Administrator" arising in the administration of the statute. A contrary construction, recognized the Court, "would, of course, raise serious questions concerning the constitutionality of §211(a)." 415 U.S. at 366. See also *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). Petitioner, exempt from military service on a full time divinity student, returned his registration certificate as a protest against American involvement in the Viet Nam war. His local board then declared him "delinquent" for violating the regulation requiring possession of certificates and reclassified him 1-A. He sued to restrain his induction, but the lower federal courts dismissed his complaint, in part on the basis of §10(b)(3) of the Military Selective Service Act of 1967, which provides that there shall be no pre-induction judicial review "of the classification or processing of any registrant," judicial review being limited to a defense in a criminal prosecution or

to habeas corpus after induction. The Supreme Court reversed, holding that "pre-induction judicial review is not precluded in cases of this type." 393 U.S. at 239. Harlan, J., concurring, observed: "To withhold pre-induction review in this case would. . . deprive petitioner of his liberty without the prior opportunity to present to any competent forum -- agency or court -- his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of §10(b)(3) would raise serious constitutional problems. . ." Id. at 243. See generally P. Bator, P. Mishkin, P. Shapiro & H. Wechsler, The Federal Court and the Federal System 309-375 (1973).

Of course, if the exclusionary rule were to be abolished, a person could not even challenge the constitutionality of the police conduct which produced the evidence when defending the criminal prosecution brought against him.

80. A. Bickel, The Morality of Consent 81 (1975).
81. Id. at 79.
82. Id. at 81.
83. See, e.g., remarks of Professor Laurence Tribe in J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1979-80 at 186 (1981).
84. 1 Cranch 137 (U.S. 1803).
85. See generally Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J.1.
86. "[L]aw. . . is a practical subject, and the first principle of law is that its commands, and above all its promises, are to be translated into practice. . ." C. Black, The Unfinished Business of the Warren Court, 46 Wash.L.Rev. 3, 28 (1970).
87. 1 Cranch at 178.
88. Id.

89. Van Alstyne, *supra* note 85, at 34.
90. Strong, Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law, 69 W.Va.L.Rev. 111, 249 (1967).
- 90.1 "The amendment nowhere specifies that a warrant may be issued only by a judge, not by an executive official, but this fact has been assumed from the very beginning and is supported by its history," Landynski, *supra* note 41, at 47. See generally 2 W.LaFave, Search and Seizure §4.2 (1978).

As the Weeks Court put it, 232 U.S. at 391, "the effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority. . . [T]he duty of giving [the protection of the Fourth Amendment] force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws."

See also United States v. United States District Court, 407 U.S. 297, 317 (1972): "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government." See also Douglas, J., dissenting in Wilson v. Schnettler, 365 U.S. 381, 396 (1961): "[T]he command of the Fourth Amendment implies continuous supervision by the judiciary over law enforcement officers, quite different from the passive role which courts play in some spheres."

91. 232 U.S. at 393-94.

92. Id. at 393.
93. See Van Alstyne, *supra* note 85. See also M. Cohen, The Faith of a Liberal, 178-80 182-85 (1946).
94. See Cohen, *supra* note 93.
95. *Steagald v. United States*, 101 S.Ct. 1642, 1651 (1981).
See generally the authorities collected in note 41 *supra*.
96. Frankfurter, J., joined by Murphy, J., dissenting in *Davis v. United States*, 328 U.S. 582, 597 (1946).
- 96.1 Frankfurter, J., joined by Jackson, J., dissenting in *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950).
97. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349, 371 (1974).
98. Id. at 430.
99. Id.
100. 1 Cranch at 163.
101. See Note, Forfeiture Seizures and the Warrant Requirement, 48 U.Chi.L.Rev. 960, 987 (1981)(describing, but not accepting, the argument that "unlike the use of illegally seized evidence, the forfeiture of illegally seized property is not an exacerbation of a constitutional injury").
102. *Dodge v. United States*, 272 U.S. 530, 532 (1926)
(contrasting the forfeiture of property seized by unauthorized local agents).
103. Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 9 (1963). The Report is often called The Allen Report, after the Chairman of the Committee, Professor Francis A. Allen.
104. Id.
105. Id. at 10. (Emphasis added.)
106. Id.
107. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). See generally W. Lockhart, Y. Kamisar & J. Choper, Constitutional

Law 626-48 (5th ed. 1980).

108. Id. at 91. (Emphasis added.)
109. Stevens, J., dissenting in *Zurcher v. Stanford Daily*,
436 U.S. 547, 582 n.9 (1978).
110. Fuentes, supra note 107, at 94 n.30.
111. Id.
112. *Ex parte Milligan*, 71 U.S.2, 127 (1866).

THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
Hutchins Hall
Ann Arbor, Michigan 48109

YALE KAMISAR
Henry K. Ransom Professor of Law

March 30, 1982

Michael Klipper, Esq.
Chief Counsel
Subcommittee on Criminal Law
of the U.S. Senate Judiciary Committee
U.S. Senate, Room 162
Russell Senate Office Building
Washington, DC 20510

Dear Mr. Klipper:

In my testimony before the U.S. Senate Subcommittee on Criminal Law last Thursday, March 25, I indicated that according to the recent writings of German scholars, it can no longer be said that no other "civilized nation" has an exclusionary rule, i.e., a rule that excludes trustworthy evidence because it was obtained in violation of some guaranty of liberty or privacy or dignity. I promised then that I would provide the Subcommittee with further information on this point. I am doing so with this letter.

In his recent article, Continental European Criminal Procedures: True or Illusive Model?, 9 *Am.J.Criminal Law* 1, 15-16 (1981), Thomas Volkmann-Schluck, a German lawyer with an LL.M. from Harvard, points out:

[I]n Germany an automatic exclusionary rule is applied which, however, is not so broad and overdrawn as its American counterpart The High Federal Appellate Court [of Germany] developed the so-called sphere-of-individual-rights doctrine [which] allows evidence to be excluded from criminal prosecution when investigating officers intrude into the constitutionally protected sphere of fundamental civil rights. . . . [The Court has] held, for example, that a personal diary should be excluded from evidence as well as an illegal tape recording of a private con-

versation. Thus, German law does recognize an absolutely protected zone where an automatic exclusionary rule applies and a grey zone where the exclusion of evidence depends on the result obtained by the balancing of interests. Those items of evidence are excluded not because they are unreliable, but because they are obtained in violation of human dignity and human rights protected by the Constitution. . . .The German exclusionary rule. . . .is not based upon any assumptions about its effectiveness as a deterrent to illegal behavior, but on the ground that the evidence is obtained in violation of human rights.

It is interesting to note that Mr. Volkmann-Schluck does not seem to be surprised or baffled by the American exclusionary rule. He attempts to explain, rather, why "a strict and broad exclusionary rule in the American sense" is not needed in Europe, but may be necessary in our country (*id.* at 16-17):

Due to the different structure of authority in Europe there is no need for a strict and broad exclusionary rule in the American sense to prevent police from violating given standards of investigation activities. Even in England, the source of the adversary model of criminal process by and large adopted by the United States, courts have held generally that all relevant evidence is admissible even if illegally obtained. Because of the more heterogeneous character of the American nation with regard to ethnicity, economy, and culture, and because of the traditional lack of control over the police by the central government, the exclusionary rule may be an appropriate response to uniquely American conditions. In a pluralistic and decentralized system of state power and authority like the United States the exclusionary rule is perhaps the only way to limit potentially unrestrained police forces. . . .In Continental Europe, where police structure is hierarchical and is supervised by the central government, or (as in Germany) by the government of the respective states, it is less difficult to make the police conform to given behavior standards. Further, Continental police do not simply adhere to rules of conduct as a result of external, hierarchically imposed regulations. A Continental police officer not only "does his job," but internalizes those regulations, considering himself a representative of the state authority --l'Etat or Staat -- a concept which is absent in the United States.

An unpublished manuscript by Dr. Walter Pakter, another German scholar currently a Research Fellow at the University of California (Berkeley) School of Law, is to the same effect. Dr. Pakter sent me a copy of the manuscript of his article, The Exclusionary Rule: A Comparative Study, several months ago at the suggestion of Professor William Van Alstyne. At p. 31 of the manuscript of the Pakter article, the author points out:

The United States is no longer the only country which invokes an automatic exclu-

sionary rule. German courts have created a similar rule. The Italian Constitutional Court has favored a limited rule and Italian scholars have urged its extension. The American rule has in fact inspired some admiration, even in countries with long-standing statutory sanctions designed to curb police lawlessness. The German and Italian experiences suggest that executive measures alone are an inadequate substitute for exclusion.

Continental law indicates that executive measures against police offenders are not adequate substitutes for exclusion. Political and historical differences render it difficult in America to legislate disciplinary sanctions for illegal police search and seizure. Even if passed, police decentralization in America would limit the effectiveness of executive measures. In Germany, executive measures have proved useful because police departments are organized on a state level, providing a promotion incentive absent from locally organized American departments.

Despite this promotion incentive and longstanding executive measures designed to curb police arbitrariness and capriciousness, Germany (and to some extent Italy) have been expanding their exclusionary rules. Evidently, executive measures alone are not adequate substitutes for exclusion. This conclusion, repeatedly drawn by American judges on the basis of human psychology, is supported by the evidence of foreign law as well. . . .

Because my copy of the Pakter article is marked up at numerous places, I am asking him to send you a clean copy. (See enclosure.)

Sincerely,

Yale Kamisar
Yale Kamisar

YK:mm

Enclosure

Senator MATHIAS. Well, it has really been enlightening, and, as is not always the case with arguments on fine points of constitutional law, it has also been entertaining. I have personally enjoyed it, and, I have benefited by it. I think that the record that has been made here today by the first panel and the second panel will make extremely useful reading for those who are interested in this important subject.

Of course, it is a subject that has been elevated to a greater degree of national attention and public interest as a result of statements of President Reagan in New Orleans and by other public figures in the administration.

So, it is a subject of importance to the whole country and it is a subject which is on our very active agenda here in the Congress.

I think all four of the witnesses today have made a very significant contribution to the Congress in wrestling with the problem. Thank you very much.

The committee will stand in adjournment, subject to the call of the Chair.

[Whereupon, the subcommittee was adjourned, subject to the call of the Chair, at 4:50 p.m.].

APPENDIX
PROPOSED LEGISLATION

97TH CONGRESS
1ST SESSION

S. 101

To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings.

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 5), 1981

Mr. DECONCINI introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 of the United States Code to define and limit the exclusionary rule in Federal criminal proceedings.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 223 of title 18, United States Code, is
4 amended by adding at the end thereof the following new
5 section:

6 "§ 3505. Definition and limitation of exclusionary rule

7 "(a) Evidence shall not be excluded from any Federal
8 criminal proceeding solely because that evidence was ob-

1 tained in violation of the fourth amendment to the Constitu-
2 tion unless the court finds as a matter of law that—

3 “(1) a violation has occurred, and

4 “(2) such violation was intentional or substantial.

5 “(b) In determining whether a violation is substantial for
6 the purposes of this section, the court shall consider all of the
7 circumstances, including—

8 “(1) the extent to which the violation was reck-
9 less;

10 “(2) the extent to which privacy was invaded;

11 “(3) the extent to which exclusion will tend to
12 prevent such violations; and

13 “(4) whether, but for the violation, the things
14 seized would have been discovered; or whether the re-
15 lationship between the things discovered and the viola-
16 tion is attenuated.”.

17 (b) The table of sections of such chapter is amended by
18 adding at the end thereof the following item:

“3505. Definition and limitation of exclusionary rule.”.

97TH CONGRESS
1ST SESSION

S. 751

To amend titles 18 and 28 of the United States Code to eliminate, and establish an alternative to, the exclusionary rule in Federal criminal proceedings.

IN THE SENATE OF THE UNITED STATES

MARCH 19 (legislative day, FEBRUARY 16), 1981

Mr. HATCH (for himself and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend titles 18 and 28 of the United States Code to eliminate, and establish an alternative to, the exclusionary rule in Federal criminal proceedings.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That (a) chapter 223 of title 18, United States Code, is
- 4 amended by adding at the end thereof the following new
- 5 section:

★(Star Print)

1 **"§ 3505. Elimination of exclusionary rule as it pertains to**
 2 **the fourth amendment.**

3 "Evidence, otherwise admissible in a Federal criminal
 4 proceeding, shall not be excluded on the grounds that such
 5 evidence was obtained in violation of the fourth amendment
 6 to the United States Constitution."

7 (b) The table of sections for chapter 223 of title 18,
 8 United States Code, is amended by adding at the end thereof
 9 the following new item:

"3505. Elimination of exclusionary rule as it pertains to the fourth amendment."

10 SEC. 2. (a) Title 28, United States Code, is amended by
 11 adding immediately after chapter 171 a new chapter 172 as
 12 follows:

13 **"Chapter 172.—ILLEGAL SEARCH AND SEIZURE**

"Sec.

"2691. Definitions.

"2692. Tort claims; illegal search and seizure.

"2693. Sanctions against investigative or law enforcement officers; illegal search
 and seizure.

"2694. Judgment as a bar.

"2695. Attorney fees and costs.

"2696. Applicability of other tort claims procedures.

14 **"§ 2691. Definitions**

15 "As used in this chapter, and section 1346(g) of this
 16 title, the term—

17 "(1) 'Federal agency' includes the executive de-
 18 partments, military departments, independent establish-
 19 ments of the United States, and corporations primarily
 20 acting as instrumentalities or agencies of the United

1 States, but does not include any contractor with the
2 United States; and

3 “(2) ‘Investigative or law enforcement officer’
4 means any officer of the United States who is empow-
5 ered by law to execute searches, to seize evidence, or
6 to make arrests for any violation of Federal law, or
7 any person acting under or at the request of such
8 officer.

9 “§ 2692. Tort claims; illegal search and seizure”

10 “(a) The United States shall be liable for any damages
11 resulting from a search or seizure conducted by an investiga-
12 tive or law enforcement officer, acting within the scope of his
13 office or employment, in violation of the fourth amendment to
14 the United States Constitution.

15 “(b) Any person aggrieved by such a violation may re-
16 cover actual damages and such punitive damages as the court
17 may award under subsection (c).

18 “(c) Punitive damages may be awarded by the court,
19 upon consideration of all of the circumstances of the case,
20 including—

21 “(1) the extent of the investigative or law en-
22 forcement officer’s deviation from permissible conduct;

23 “(2) the extent to which the violation was willful,
24 reckless, or grossly negligent;

1 “(3) the extent to which the aggrieved person’s
2 privacy was invaded;

3 “(4) the extent of the aggrieved person’s personal
4 injury, both physical and mental;

5 “(5) the extent of any property damage; and

6 “(6) the effect such an award would have in pre-
7 venting future violations of the fourth amendment to
8 the United States Constitution.

9 “(d) Notwithstanding subsections (b) and (c), the recov-
10 ery of any person who is convicted of any offense for which
11 evidence of such offense was seized in violation of the fourth
12 amendment to the United States Constitution is limited to
13 actual physical personal injury and to actual property
14 damage sustained as a result of the unconstitutional search
15 and seizure.

16 “(e) No judgment, award, compromise, or settlement of
17 any action brought under this section shall exceed the
18 amount of \$25,000, including actual and punitive damages.
19 The United States shall not be liable for interest prior to
20 judgment.

21 “(f) Any action under this section shall be brought
22 within the period of limitations provided in section 2401(b) of
23 this title.

1 **"§ 2693. Sanctions against investigative or law enforce-**
2 **ment officers; illegal search and seizure**

3 "An investigative or law enforcement officer who con-
4 ducts a search or seizure in violation of the fourth amend-
5 ment to the United States Constitution shall be subject to
6 appropriate discipline in the discretion of the Federal agency
7 employing such officer, if that agency determines, after notice
8 and hearing, that the officer conducted such search or seizure
9 lacking a good faith belief that such search or seizure was
10 constitutional.

11 **"§ 2694. Judgment as a bar**

12 "The remedy against the United States provided under
13 this chapter shall be the exclusive civil remedy for a violation
14 of the fourth amendment to the United States Constitution by
15 any investigative or law enforcement officer acting within the
16 scope of his office or employment whose act or omission gave
17 rise to the claim.

18 **"§ 2695. Attorney fees and costs**

19 "In any action brought under this chapter, the court
20 may award any claimant who prevails in such action reason-
21 able attorney fees, and other litigation costs reasonably
22 incurred.

23 **"§ 2696. Applicability of other tort claims procedures**

24 "The procedures provided in sections 2672, 2675,
25 2677, 2678, 2679, and 2680 of this title apply to any action
26 brought under this chapter. For the purposes of such sec-

1 tions, any investigative or law enforcement officer who con-
 2 ducts a search and seizure in violation of the fourth amend-
 3 ment to the Constitution shall be treated as if he were an
 4 'employee of the government'.".

5 (b) The table of chapters for title 28, United States
 6 Code, and for part VI of title 28, United States Code, are
 7 each amended by inserting immediately after the item relat-
 8 ing to chapter 171 the following:

"172. Illegal Search and Seizure..... 2691".

9 SEC. 3. Section 1346 of title 28, United States Code, is
 10 amended by adding immediately after subsection (f) the fol-
 11 lowing new subsection:

12 "(g) The district courts, together with the United States
 13 District Court for the District of the Canal Zone, the United
 14 States District for the Territory of Guam, the District Court
 15 for the Northern Mariana Islands, and the District Court of
 16 the Virgin Islands, shall have exclusive original jurisdiction
 17 of any civil action on a claim against the United States, for
 18 money damages, brought under chapter 172 of this title.".

19 SEC. 4. (a) Section 1402(b) of title 28, United States
 20 Code, is amended by inserting after "subsection (b)" the fol-
 21 lowing: "or subsection (g)".

22 (b) Section 1504 of title 28, United States Code, is
 23 amended by striking "section 1346(b)" and inserting in lieu

1 thereof "under subsection (b) or subsection (g) of section
2 1346".

3 SEC. 5. The civil action against the United States pro-
4 vided by the amendments to title 28, United States Code,
5 made by this Act shall apply only to claims arising on or
6 after the date of enactment of this Act.

97TH CONGRESS
1ST SESSION

S. 1995

To remedy procedural and structural defects in the criminal justice system.

IN THE SENATE OF THE UNITED STATES

DECEMBER 16 (legislative day, NOVEMBER 30), 1981

Mr. DOLE (for himself and Mr. EAST) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To remedy procedural and structural defects in the criminal justice system.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Criminal Procedures Act
4 of 1982".

5

PURPOSE

6 SEC. 2. The purpose of this Act is to amend Federal
7 criminal procedures in such respects as are necessary to pro-
8 vide for increased effectiveness, fairness, and certainty in the
9 administration of the criminal statutes of the United States.

CRIMINAL FORFEITURES

1

2 . SEC. 3. (a) Section 1963 of title 18, United States
3 Code, is amended—

4 (1) in subsection (a) by inserting after “of this
5 chapter shall”, the following: “, upon the first such
6 conviction,”;

7 (2) in subsection (a) by striking out “and” after
8 “1962,”;

9 (3) in subsection (a) by inserting before the period
10 the following: “, and (3) any profits or proceeds of the
11 unlawful activities engaged in by the individual found
12 to have violated such section, in whatever form held,
13 and without regards to whether or not legal title to
14 such profits or proceeds is vested in such individual”;

15 (4) by redesignating subsections (b) and (c) as sub-
16 sections (f) and (g); and

17 (5) by inserting after subsection (a), the following
18 new subsections:

19 “(b)(1) Whoever is convicted of violating any provision
20 of section 1962 of this chapter, after having been previously
21 convicted for a separate violation of any of the provisions of
22 such section, shall, where such subsequent conviction is in
23 whole or in part based upon acts committed since the date of
24 the first such conviction, be fined not less than \$50,000 nor
25 more than \$200,000 for each such subsequent violation, and

1 shall be sentenced to a term of life imprisonment. Such
2 person shall not be eligible for probation upon such subse-
3 quent conviction, nor shall such person be eligible for parole
4 or furlough, upon such term of imprisonment before having
5 served a minimum of twenty years of such term of imprison-
6 ment.

7 “(2) In addition to the foregoing, such person so con-
8 victed of a second offense under section 1962 of this chapter
9 shall forfeit to the United States any interest in property
10 forfeitable under the provisions of subsection (a) of this sec-
11 tion, as well as any and all interests in personal or real prop-
12 erty acquired by him or by another person for his use and
13 benefit since the date of the first such conviction, or the pro-
14 ceeds thereof in whatever form, if it be shown by a prepon-
15 derance of the evidence that—

16 “(A) such person was not engaged in any lawful,
17 gainful employment during the period from the first
18 such conviction up to the date of the filing of criminal
19 charges which form the basis for the second such con-
20 viction;

21 “(B) such person, although engaged in lawful em-
22 ployment during the period specified in subparagraph
23 (A) of this paragraph, nevertheless obtained the major-
24 ity portion of his income during such period from un-
25 lawful activities; or

1 “(C) such person did, during the period specified
2 in subparagraph (A) of this paragraph, commit or cause
3 to be committed an act of injury or destruction to per-
4 sons or property for the purpose of furthering or con-
5 cealing the unlawful activities which formed the basis
6 for such person’s subsequent conviction, whether such
7 acts were committed or caused to be committed by him
8 personally or through his agent or employee.

9 “(3) Such real and personal assets as are forfeitable
10 under the provisions of this section shall be forfeitable even
11 though they have been transferred to the control and owner-
12 ship of another person, if it be shown that the actual use and
13 benefit of such property was retained by the convicted person
14 whose assets are subject to such forfeiture; or, if it be shown
15 that such assets were transferred to another person who
16 aided and abetted the commission of the criminal acts for
17 which such person whose assets are forfeitable was convict-
18 ed, regardless of who may have the use and benefit of such
19 property.

20 “(c) To the extent that assets, interests, profits, and
21 proceeds forfeitable under this section—

22 “(1) cannot be located;

23 “(2) have been transferred, sold to, or deposited
24 with third parties; or

1 “(3) have been placed beyond the jurisdiction of
2 the United States,
3 the court, upon conviction of the individual charged, may
4 direct the defendant to forfeit such other assets as may be
5 available, limited in value to those assets that would other-
6 wise be forfeited under subsections (a) and (b) of this section.
7 Upon petition of the defendant, the court may authorize re-
8 demption of assets forfeited under this subsection, provided
9 the assets described in subsections (a) and (b) are surrendered
10 or otherwise remitted by such defendant to the jurisdiction of
11 the court.”.

12 (b) Section 408 of the Comprehensive Drug Abuse Pre-
13 vention and Control Act of 1970 (Public Law 91-513, 21
14 U.S.C. 848) is amended—

15 (1) in subsection (a)(1) thereof—

16 (A) by striking out “in paragraph (2)”, prior
17 to the first semicolon in such subsection and in-
18 serting in lieu thereof the following: “by this sec-
19 tion”; and

20 (B) by striking out the words “in paragraph
21 (2)” at the end of such subsection and inserting in
22 lieu thereof “this section”;

23 (2) in subsection (a)(2)(A) by adding after “the
24 profits obtained by him in such enterprise” the follow-
25 ing: “, including any profits and proceeds, regardless of

1 the form in which held, that are acquired, derived,
2 used, or maintained, directly or indirectly, in connec-
3 tion with or as a result of a violation of paragraph
4 (1)";

5 (3) by adding after subsection (a)(2) the following:

6 "(3) Any person who is convicted a second time under
7 paragraph (1) of continuing in a criminal enterprise shall for-
8 feit to the United States all property which is forfeitable
9 under the provisions of subsection (a)(2) of this section, in
10 addition to any and all interest of such person in personal or
11 real property acquired by him or by another person for his
12 use and benefit since the date of the first such conviction, or
13 the proceeds thereof in whatever form, if it be shown by a
14 preponderance of the evidence, that—

15 "(A) such person was not engaged in any lawful,
16 gainful employment during the period from the first
17 such conviction up to the date of the filing of criminal
18 charges which form the basis for the second such con-
19 viction;

20 "(B) such person, although engaged in lawful em-
21 ployment during the period specified in subsection
22 (a)(3)(A)(i) above, nevertheless obtained the majority
23 portion of his income during such period from unlawful
24 activities; or

1 “(C) such person did, during the period specified
2 in subsection (a)(3)(A)(i) above, commit or cause to be
3 committed acts of injury or destruction to persons or
4 property for the purpose of furthering or concealing the
5 unlawful activities which formed the basis for such per-
6 son’s subsequent conviction, whether such acts were
7 committed or caused to be committed by such person
8 personally or by or through an agent or employee of
9 such person.

10 Such real and personal assets as are forfeitable under the
11 provisions of this section shall be forfeitable even though they
12 have been transferred to the control and ownership of an-
13 other person, if it be shown that the actual use and benefit of
14 such property was retained by the convicted person whose
15 assets are subject to forfeiture; or, if it be shown that such
16 assets were transferred to another person who aided and
17 abetted the commission of the criminal acts for which such
18 person whose assets are subject to forfeiture was convicted,
19 regardless of who may have the use and benefit of such prop-
20 erty.”; and

21 (4) by adding the following new subsection after
22 subsection (d):

23 “(e) To the extent that assets, interests, profits, and
24 proceeds forfeitable pursuant to this section—

25 “(1) cannot be located;

1 “(2) have been transferred, sold to, or deposited
2 with third parties; or

3 “(3) have been placed beyond the territorial juris-
4 diction of the United States,

5 the court, upon conviction of the individual charged, may
6 direct forfeiture of such other assets of the defendant as may
7 be available, limited in value to those assets that would oth-
8 erwise be forfeited under subsection (a) of this section. Upon
9 petition of the defendant, the court may authorize redemption
10 of assets forfeited under this subsection, provided the assets
11 described in subsection (a) are surrendered or otherwise re-
12 mitted by such defendant to the jurisdiction of the court.”.

13 (c)(1) Title 28, United States Code, is amended by
14 adding after section 529 thereof the following:

15 **“§ 529A. Negotiations with foreign governments**

16 “(a) The Attorney General shall move expeditiously to
17 conduct negotiations to conclude agreements to secure the
18 cooperation of the law enforcement authorities of foreign
19 countries in order to effectively deprive domestic criminals of
20 the use of foreign havens for the proceeds of their crimes.

21 “(b) The Attorney General shall report to the Commit-
22 tees on the Judiciary of the Senate and the House of Repre-
23 sentatives within six months after the date of enactment of
24 this section on progress being made to conclude such agree-
25 ments.”.

1 (2) The table of sections for chapter 31, title 28, United
 2 States Code, is amended by adding after the item relating to
 3 section 529, the following:

"529A. Negotiations with foreign governments."

4

BAIL REFORM

5 SEC. 4. (a) Sections 3150, 3151, and 3152 of title 18,
 6 United States Code, are redesignated as sections 3156,
 7 3157, and 3158, respectively.

8 (b) Chapter 207 of title 18, United States Code, is
 9 amended by striking out sections 3146-3149 and inserting in
 10 lieu thereof the following:

11 "**§ 3146. Release authority generally**

12 "Any person charged with an offense may be ordered
 13 released or detained pursuant to the provisions of this chapter
 14 by a judge authorized to order the arrest and commitment of
 15 offenders, but a person charged with an offense for which a
 16 sentence of death is authorized may be ordered released only
 17 by a judge of a court of the United States that has original
 18 jurisdiction in criminal cases.

19 "**§ 3147. Release pending trial in a noncapital case**

20 "(a) Any person charged with an offense, other than an
 21 offense for which a sentence of death is authorized, shall, at
 22 his appearance before a judge, be ordered detained or re-
 23 leased pending trial. If released, the person may be released
 24 on his personal recognizance, or upon the execution of an

1 unsecured appearance bond in an amount specified by the
2 judge, and upon the mandatory condition set forth in subsec-
3 tion (d) of this section, unless the judge determines, in the
4 exercise of his discretion, that such release will not reason-
5 ably assure the appearance of the person as required. If such
6 a determination is made, the judge shall, either in lieu of or in
7 addition to the above methods of release, impose the manda-
8 tory condition set forth in subsection (d) and the least restric-
9 tive condition or combination of conditions of release set forth
10 in subsection (e) that will reasonably assure the appearance
11 of the person for trial. After the court has determined the
12 conditions of release pursuant to this subsection, and the
13 person has indicated that he can satisfy those conditions, the
14 court shall consider the provisions of subsection (b).

15 “(b) The court upon ordering the detention or release of
16 a person pursuant to subsection (a) shall determine, in the
17 exercise of its discretion, whether such release will endanger
18 the safety of any other person or the community. If such a
19 determination is made, the judge shall, either in lieu of or in
20 addition to the conditions set pursuant to subsection (a),
21 impose the least restrictive condition or combination of condi-
22 tions of release set forth in subsection (e) that will reasonably
23 assure the safety of any other person or the community. No
24 financial condition set forth in subsection (e) may be imposed
25 to assure the safety of any person or of the community.

1 “(c) If, after a due process hearing as defined in section
2 3149(d) of this chapter the court finds that there is clear and
3 convincing evidence that the person is likely to flee or is a
4 danger to any other person or to the community, and that no
5 condition or combination of conditions of release will reason-
6 ably assure the defendant’s appearance or the safety of any
7 other person or of the community, then the court shall order
8 such person detained in custody.

9 “(d) The judge shall provide as an explicit condition of
10 release for any person ordered released pursuant to this sub-
11 section, that the person not commit a Federal, State, or local
12 crime during the period of his release.

13 “(e) The judge may provide as an explicit condition of
14 release for any person ordered released pursuant to this sub-
15 chapter that the person—

16 “(1) remain in the custody of a designated person
17 who agrees to supervise him, if the designated person
18 is reasonably able to assure the judge that the person
19 will appear as required and will not pose a danger to
20 the safety of another person or the community;

21 “(2) abide by specified restrictions on his travel,
22 associations, or place of abode;

23 “(3) work conscientiously at his employment, or if
24 unemployed, actively seek employment;

1 “(4) report on a regular basis to a designated law
2 enforcement agency or pretrial service agency;

3 “(5) refrain from excessive use of alcohol, or any
4 use of a narcotic drug or other controlled substance, as
5 defined in section 102 of the Controlled Substances
6 Act (21 U.S.C. 802), without a prescription by a li-
7 censed medical practitioner;

8 “(6) avoid all contact with potential witnesses
9 who may testify concerning the offense;

10 “(7) refrain from possessing a firearm, destructive
11 device, or other dangerous weapon;

12 “(8) undergo available medical or psychiatric
13 treatment, including treatment for drug or alcohol de-
14 pendency, and remain in a specified institution if re-
15 quired for that purpose;

16 “(9) execute an appearance bond in a specified
17 amount and deposit in the registry of the court, in cash
18 or other security as directed, a sum not to exceed 10
19 per centum of the amount of the bond, which deposit is
20 to be returned upon the performance of the conditions
21 of release;

22 “(10) execute a bail bond with solvent sureties, or
23 deposit cash in lieu of such a bond; or

24 “(11) satisfy any other condition reasonably nec-
25 essary to assure appearance as required pursuant to

1 subsection (a) and to assure the safety of any other
2 person or the community pursuant to subsection (b), in-
3 cluding a condition requiring that the person return to
4 official detention after specified hours or during speci-
5 fied periods, and abide by such other restrictions on the
6 person's freedom, associations, or activities that the
7 court deems appropriate.

8 A defendant who is detained or subject to restrictions be-
9 cause of the imposition of a condition set forth in subsection
10 (e)(11) shall be brought to trial expeditiously pursuant to the
11 provisions of chapter 208 of this title. The court may only
12 impose financial conditions of release pursuant to this subsec-
13 tion for the purpose of assuring a defendant's appearance in
14 court.

15 "(f) In determining whether the person should be de-
16 tained or which conditions of release will reasonably assure
17 the appearance of the person as required and will reasonably
18 assure the safety of any other person or the community, the
19 judge shall, on the basis of available information, take into
20 account—

21 "(1) the nature and circumstances of the offense
22 charged;

23 "(2) the weight of the evidence against the
24 person; and

1 “(3) the history and characteristics of the person,
2 including his character, mental condition, family ties,
3 employment, past conduct, length of residence in the
4 community, financial resources, record of convictions,
5 record of appearance, flight to avoid appearance, or
6 nonappearance at court proceedings, the use of illegal
7 drugs, whether he was on probation, parole, or other
8 release pending completion of sentence for a conviction
9 under Federal, State, or local law at the time of the
10 current arrest, and whether he was on pretrial release
11 or release pending sentence or appeal for an offense
12 under Federal, State, or local law at the time of the
13 current arrest.

14 “(g) A judge authorizing the release or detention of a
15 person pursuant to this section shall issue an order containing
16 a statement of the reasons for detention if imposed, or any
17 conditions of release imposed, shall advise him of the penal-
18 ties applicable to a violation of a condition of his release, and
19 shall advise him that a warrant for his arrest will be issued
20 immediately upon such a violation.

21 “(h) In any case in which a judge has ordered a person
22 detained and has imposed conditions upon the release of such
23 person, if, twenty-four hours after the release hearing, such
24 person continues to be detained because of his inability to
25 meet the conditions of release he may, upon application, have

1 the detention order or conditions reviewed by the judge who
2 imposed them. A person who is detained or ordered released
3 on a condition that requires him to return to official detention
4 after specified hours may, upon application, have the order of
5 detention or condition reviewed by the judge who imposed it.
6 Unless the order of detention or conditions of release are
7 amended and the person is thereupon detained or released on
8 another condition, the judge shall set forth in writing the rea-
9 sons for continuing the detention or conditions imposed. If
10 the judge who ordered the detention or imposed conditions of
11 release is not available, any other judge in the district may
12 review such conditions.

13 “(i) A judge ordering the detention or release of a
14 person on a condition specified in this section may at any
15 time amend his order to impose additional or different condi-
16 tions of release. If the imposition of such additional or differ-
17 ent conditions results in the detention of the person as a
18 result of his inability to meet such conditions, the provisions
19 of subsection (h) are applicable.

20 “(j) Any information may be presented and considered
21 in connection with an order entered pursuant to this section
22 regardless of its admissibility under the rules governing ad-
23 mission of evidence in criminal trials.

1 “(k) A judge may detain, for a period of ten days or less,
2 a person charged with an offense who comes before him for a
3 pretrial release determination if it appears that the person—

4 “(1) is, and at the time the offense was committed
5 was, on pretrial or other release for a felony under
6 State or Federal law; or

7 “(2) is on probation, parole, or other release pend-
8 ing completion of sentence for any offense under Fed-
9 eral, State, or local law;

10 and that the person may flee or pose a danger to any other
11 person or to the community if released. During the ten-day
12 period, the United States attorney shall notify the appropri-
13 ate court, probation, or parole official. If the official fails or
14 declines to take the person into custody during such period,
15 the person shall be treated in accordance with the provisions
16 of subsections (a) through (e).

17 “(l) A court may dispose of an offense that is a misde-
18 meanor or an infraction by entering an order directing forfeit-
19 ure of collateral posted to assure appearance if a fine in such
20 an amount would be an appropriate sentence after conviction
21 of the offense charged.

22 **“§3148. Release pending trial in a capital case**

23 “A person who is charged with an offense for which a
24 sentence of death is authorized shall be treated in accordance
25 with the provisions of section 3147, unless the judge has

1 reason to believe that no conditions of release will reasonably
2 assure that the person will not flee or will not pose a danger
3 to any other person or to the community. If such a risk of
4 flight or danger is believed to exist, the person shall be or-
5 dered detained. Such an order is not appealable under section
6 3151, but may be reviewed under other provisions for review
7 of conditions of release or orders of detention.

8 **"§ 3149. Release pending sentence or appeal**

9 “(a) The judge shall order that a person who has been
10 found guilty of an offense and who is awaiting imposition or
11 execution of his sentence be held in official detention unless
12 the judge finds, pursuant to a due process hearing, by clear
13 and convincing evidence that the person is not likely to flee
14 or pose a danger to the safety of any other person or to the
15 community. If the judge finds that the person is not likely to
16 flee or to pose a danger to the safety of any person or to the
17 community, the person shall be treated in accordance with
18 the provisions of section 3147.

19 “(b) The judge shall order that a person who has been
20 found guilty of an offense and sentenced to a term of impris-
21 onment, and who has filed an appeal or a petition for a writ
22 of certiorari, be held in official detention, unless the judge
23 finds pursuant to a due process hearing—

1 “(1) by clear and convincing evidence that the
2 person is not likely to flee or pose a danger to the
3 safety of any other person or the community; and

4 “(2) that the appeal is not frivolous nor taken for
5 purposes of delay.

6 If the judge finds that the person is not likely to flee or pose
7 a danger to the safety of any other person or the community
8 and that the appeal is not frivolous or taken for purposes of
9 delay, the person shall be treated in accordance with the pro-
10 visions of section 3147.

11 “(c) The judge shall treat a defendant in a case in which
12 an appeal has been taken by the United States pursuant to
13 the provisions of section 3731 in accordance with the provi-
14 sions of section 3147.

15 “(d) For the purposes of this section and section
16 3147(c), ‘due process hearing’ means a hearing conducted in
17 accordance with the requirements of the due process clause
18 of the fifth amendment to the United States Constitution in-
19 cluding but not limited to the right to counsel, the right to
20 cross-examine witnesses, and the right to present evidence.

21 **“§ 3150. Release of a material witness**

22 “If it appears from an affidavit filed by a party that the
23 testimony of a person is material in a criminal proceeding,
24 and if it is shown that it may become impracticable to secure
25 his presence by subpoena, a judge may order the arrest of such

1 witness and shall impose conditions of release pursuant to
2 section 3147. No material witness may be detained because
3 of his inability to comply with any condition of release if the
4 testimony of such witness can adequately be secured by dep-
5 osition, and if further detention is not necessary to prevent a
6 failure of justice. Release may be delayed for a reasonable
7 period of time until the deposition of the witness can be taken
8 pursuant to the Federal Rules of Criminal Procedure.

9 **"§ 3151. Appeal from denial of release**

10 “(a) Any person—

11 “(1) who is detained, or whose release on a condi-
12 tion requiring him to return to custody after specified
13 hours is continued; and

14 “(2) whose application pursuant to section 3147
15 (h) and (i) has been reviewed by a judge other than—

16 “(A) a judge of the court having original ju-
17 risdiction over the offense with which he is
18 charged;

19 “(B) a judge of a United States court of ap-
20 peals; or

21 “(C) a Justice of the Supreme Court of the
22 United States;

23 may file a motion with the court having original jurisdiction
24 over the offense with which he is charged for an amendment
25 to the order. Such a motion shall be determined promptly.

1 “(b) In a case in which a person is detained after—

2 “(1) a court denies a motion under subsection (a)

3 to amend an order imposing conditions of release; or

4 “(2) conditions of release have been imposed or

5 amended by a judge of the court having original juris-

6 diction over the offense charged;

7 an appeal may be taken to the court having appellate juris-

8 diction over such court. An order so appealed shall be af-

9 firmed if it is supported by the proceedings below. If the

10 order is not so supported, the court may remand the case for

11 a further hearing, or may, with or without additional evi-

12 dence, order the person released pursuant to section 3147.

13 Such an appeal shall be determined promptly.

14 **“§ 3152. Sanctions for violation of release conditions**

15 “(a) A person who has been released pursuant to section

16 3147, and who has violated a condition of release, is subject

17 to revocation of such release, an order of detention, and a

18 prosecution for contempt of court in addition to such further

19 criminal or civil penalties which may be applicable to the

20 circumstances of the violation.

21 “(b) An attorney for the Government may initiate a pro-

22 ceeding for revocation of an order of release by filing a

23 motion with the district court. A judge may issue a warrant

24 for the arrest of a person charged with violating a condition

25 of release, and the person shall be brought before a judge in

1 the district in which his arrest was ordered for a proceeding
2 in accordance with this section. The judge shall enter an
3 order of revocation and detention if, after a hearing, the
4 judge—

5 “(1) finds that there is clear and convincing evi-
6 dence that such person has violated a condition of his
7 release; and

8 “(2) finds that—

9 “(A) based on the factors set forth in section
10 3147(f), there is no condition or combination of
11 conditions of release that will assure that such
12 person will not flee or pose a danger to the safety
13 of any other person or of the community; or

14 “(B) no condition or combination of condi-
15 tions will assure that the person will abide with
16 such reasonable conditions of release as may be
17 imposed by the court.

18 If the judge finds that there are conditions of release that will
19 assure that the person will not flee or pose a danger to the
20 safety of any other person or the community, and that the
21 person will abide by such appropriate conditions, he shall
22 treat the person in accordance with the provisions of section
23 3147 and amend conditions of release to the extent necessary
24 to assure compliance with the conditions of release.

1 “(c) A law enforcement officer, authorized to make an
2 arrest for an offense committed in his presence, may arrest a
3 person who has been released pursuant to section 3147 if he
4 has reasonable grounds to believe that the person has violat-
5 ed a condition of release imposed on such person and set
6 forth in subsection 3147(e)(2), 3147(e)(5), 3147(e)(6), or
7 3147(e)(7).

8 **“§ 3153. Release in a case removed from a State court**

9 “‘If the judgment of a State court in a criminal proceed-
10 ing is before the Supreme Court of the United States for
11 review, the defendant may not be released from custody
12 pending such review other than pursuant to the laws of such
13 State.

14 **“§ 3154. Surrender of an offender by a surety**

15 “A person charged with an offense, who is released
16 upon the execution of an appearance bond with a surety, may
17 be arrested by the surety, delivered to a United States mar-
18 shal, and brought before a judge. At the request of the
19 surety, the judge shall order the person held in official deten-
20 tion, and shall endorse on the recognizance, or on the certi-
21 fied copy of the recognizance, the discharge and exoneretur
22 of the surety. The person so committed shall be held in offi-
23 cial detention until released pursuant to this chapter or to
24 another provision of law.

1 "§ 3155. Commitment of an arrested person

2 “(a) A person who is arrested and charged with an of-
3 fense or held as a material witness and who is not ordered
4 released pursuant to the provisions of this chapter, shall be
5 ordered committed to the custody of the Attorney General for
6 confinement in a facility for official detention. A copy of the
7 order shall be delivered to the person in charge of the facility
8 as evidence of his authority to hold the arrested person, and
9 the original order, with the return endorsed thereon, shall be
10 returned to the court that issued it.

11 “(b) The person in charge of an official detention facility
12 to whom an arrested person is delivered pursuant to the pro-
13 visions of subsection (a) shall deliver the person to a United
14 States marshal for the purpose of a court appearance on
15 order of a court of the United States or on request of an
16 attorney for the Government.”.

17 “(c) The table of sections for chapter 207 of title 18,
18 United States Code, is amended by adding after the item
19 relating to section 3145 the following:

“3146. Release authority generally.

“3147. Release pending trial in a noncapital case.

“3148. Release pending trial in a capital case.

“3149. Release pending sentence or appeal.

“3150. Release of a material witness.

“3151. Appeal from denial of release.

“3152. Sanctions for violation of release conditions.

“3153. Release in a case removed from a State court.

“3154. Surrender of an offender by a surety.

“3155. Commitment of an arrested person.

“3156. Penalties for failure to appear.

“3157. Contempt.

“3158. Definitions.”.

EXCLUSIONARY RULE

1

2 SEC. 5. (a) Chapter 223 of title 18, United States Code,
3 is amended by adding at the end thereof the following:

4 "§ 3505. Exclusionary rule

5 "(a) No evidentiary matter, otherwise admissible under
6 applicable law, shall be excluded from being considered by
7 the court or by the jury in any Federal criminal proceeding
8 solely on the grounds that such evidence has been obtained in
9 violation of any regulatory, statutory, or constitutional provi-
10 sion of Federal or State law, unless the court finds as a
11 matter of law that such evidence—

12 "(1) was obtained by the employment of methods
13 which constituted a violation of constitutionally pro-
14 tected rights of a defendant, which violation resulted in
15 actual prejudice to such defendant; and

16 "(2) was obtained as a result of intentional mis-
17 conduct by agents of the Government of such a nature
18 as to indicate—

19 "(A) willful intent to subvert the require-
20 ments of the law, or

21 "(B) gross negligence with respect to or
22 wanton disregard for, the requirements of the law
23 or the rights of the defendant; and

1 “(3) was not, and would not have been, known to
2 agents of the Government but for the acts done in vio-
3 lation of the defendant’s constitutional rights.

4 “(b) In evaluating the prejudicial nature of the acts con-
5 stituting a violation of a defendant’s constitutional rights, the
6 court shall consider the totality of the circumstances, includ-
7 ing the following:

8 “(1) the extent to which the violation was willful
9 or reckless;

10 “(2) the extent to which privacy was invaded; and

11 “(3) the extent to which exclusion will tend to
12 prevent such violations.

13 “(c) In applying this section, no court shall prohibit the
14 consideration of any evidence by the court or jury which was
15 procured by officers who acted in good faith reliance upon a
16 reasonable belief in the legitimacy of their actions in obtain-
17 ing such evidence, regardless of any violation of law which
18 may have occurred pursuant thereto.”.

19 (b) Chapter 171 of title 28, United States Code, is
20 amended—

21 (1) in section 2671 by adding at the end thereof
22 the following paragraph:

23 “‘Investigative or law enforcement officer’ means any
24 officer of the United States empowered by law to execute
25 searches, to seize evidence, or to make arrests for any viola-

1 tion of Federal law, or any person acting under the authority
2 of such officer.”;

3 (2) in section 2674 by adding before the period at
4 the end of the first paragraph thereof the following: “,
5 except as provided herein”; and

6 (3) by adding at the end thereof the following:

7 **“§ 2681. Tort claims: Illegal search and seizure**

8 “(a) The United States shall be liable for any damages
9 resulting from tortious acts of the types specified in section
10 2680(h) of this chapter which are committed by an investiga-
11 tive or law enforcement officer of the United States during a
12 search or seizure conducted by such officer while acting
13 within the scope of his office or employment, where such
14 search or seizure is conducted in violation of the fourth
15 amendment to the United States Constitution: *Provided*,
16 That such violation was one—

17 “(1) that was committed with willful intent to
18 subvert the requirements of the law, or

19 “(2) that was the result of gross negligence with
20 respect to, or wanton disregard for, the requirements of
21 the law or the constitutional or statutory rights of the
22 aggrieved party.

23 “(b) Any person aggrieved by such a violation may re-
24 cover such actual and punitive damages as the court may
25 award under subsection (e) of this section.

1 “(c) Punitive damages may be awarded by the court
2 upon consideration of all the circumstances of the case, in-
3 cluding—

4 “(1) the extent of the investigative or law en-
5 forcement officer’s deviation from permissible conduct;

6 “(2) the extent to which the violation was willful
7 or a result of grossly negligent behavior;

8 “(3) the extent to which the aggrieved person’s
9 privacy was invaded;

10 “(4) the extent of the aggrieved person’s personal
11 injury, both physical and mental;

12 “(5) the extent of any property damage; and

13 “(6) the effect such an award would have in pre-
14 venting future violations of the fourth amendment to
15 the United States Constitution.

16 “(d) Notwithstanding subsections (b) and (c) of this sec-
17 tion, the recovery of any person who is convicted of any of-
18 fense for which evidence of such offense was seized in viola-
19 tion of the fourth amendment to the United States Constitu-
20 tion is limited to actual physical personal injury and to actual
21 property damage sustained as a result of the unconstitutional
22 search and seizure.

23 “(e) No judgment, award, compromise, or settlement of
24 any action brought under this section shall exceed the
25 amount of \$25,000, including actual and punitive damages.

1 The United States shall not be liable for interest prior to
2 judgment.

3 “(f) Any action under this section shall be brought
4 within the period of limitations provided in section 2401(b) of
5 this title, and shall be brought in accordance with, and sub-
6 ject to, all other applicable provisions of this chapter and
7 section 1346(b) of this title.

8 “(g) The tort remedy against the United States provided
9 for in this section shall apply only to claims arising on or
10 after the date of enactment of this section.

11 § 2682. Frivolous tort claims

12 “A party who files a lawsuit against the United States
13 under the provisions of this chapter may be held liable to the
14 Government by the court (upon the motion of the Govern-
15 ment) for expenses incurred by the Government in defending
16 such lawsuit, including a reasonable sum equivalent in value
17 to the services rendered by the Government attorneys in de-
18 fense of such lawsuit if such lawsuit is judicially determined
19 to be founded upon claims which are clearly frivolous and
20 lacking in any substantial merit.”.

21 MENTAL IMPAIRMENT OF CRIMINAL OFFENDERS OR
22 DEFENDANTS

23 SEC. 6. (a) Chapter 313 of title 18, United States Code,
24 is amended to read as follows:

1 **"CHAPTER 313—OFFENDERS WITH MENTAL**
 2 **DISEASE OR DEFECT**

"Sec.

"4241. Determination of mental competency to stand trial.

"4242. Determination of the existence of insanity at the time of the offense.

"4243. Hospitalization of a person found not guilty by reason of insanity.

"4244. Hospitalization of a convicted person suffering from mental disease or defect.

"4245. Hospitalization of an imprisoned person suffering from mental disease or defect.

"4246. Hospitalization of a person due for release but suffering from mental disease or defect.

"4247. General provisions for chapter 313.

3 **"§ 4241. Determination of mental competency to stand**
 4 **trial**

5 "(a) At any time after the commencement of a prosecu-
 6 tion for an offense and prior to the sentencing of the defend-
 7 ant, the defendant or the attorney for the Government may
 8 file a motion for a hearing to determine the mental competen-
 9 cy of the defendant. The court shall grant the motion, or
 10 shall order such a hearing on its own motion, if there is rea-
 11 sonable cause to believe that the defendant may presently be
 12 suffering from a mental disease or defect rendering him men-
 13 tally incompetent to the extent that he is unable to under-
 14 stand the nature and consequences of the proceedings against
 15 him or to assist properly in his defense.

16 "(b) Prior to the date of the hearing, the court may
 17 order that a psychiatric examination of the defendant be con-
 18 ducted, and that a psychiatric report be filed with the court,
 19 pursuant to the provisions of section 4247 (b) and (c).

1 “(c) The hearing shall be conducted pursuant to the pro-
2 visions of section 4247(d).

3 “(d) If, after the hearing, the court finds by a preponder-
4 ance of the evidence that the defendant is presently suffering
5 from a mental disease or defect rendering him mentally in-
6 competent to the extent that he is unable to understand the
7 nature and consequences of the proceedings against him or to
8 assist properly in his defense, the court shall commit the de-
9 fendant to the custody of the Attorney General. The Attor-
10 ney General shall hospitalize the defendant for treatment in a
11 suitable mental hospital, or in another facility designated by
12 the court as suitable—

13 “(1) for such a reasonable period of time as is
14 necessary to determine whether there is a substantial
15 probability that in the foreseeable future he will attain
16 the capacity to permit the trial to proceed; and

17 “(2) for an additional reasonable period of time
18 until—

19 “(A) his mental condition is so improved that
20 trial may proceed; or

21 “(B) the pending charges against him are
22 disposed of according to law.

23 If a defendant's mental condition is determined to be such
24 that there is not substantial probability that in the foreseeable
25 future he will attain the capacity to permit the trial to pro-

1 ceed, the defendant is subject to the provisions of section
2 4246.

3 “(e) When the director of the facility in which a defend-
4 ant is hospitalized pursuant to subsection (d) determines that
5 the defendant has recovered to such an extent that he is able
6 to understand the nature and consequences of the proceed-
7 ings against him and to assist properly in his defense, he shall
8 promptly file a certificate to that effect with the clerk of the
9 court that ordered the commitment. The clerk shall send a
10 copy of the certificate to the defendant’s counsel and to the
11 attorney for the Government. The court shall hold a hearing,
12 conducted pursuant to the provisions of section 4247(d), to
13 determine the competency of the defendant. If, after the
14 hearing, the court finds by a preponderance of the evidence
15 that the defendant has recovered to such an extent that he is
16 able to understand the nature and consequences of the pro-
17 ceedings against him and to assist properly in his defense, the
18 court shall order his immediate discharge from the facility in
19 which he is hospitalized and shall set the date for trial.

20 “(f) A finding by the court that the defendant is mental-
21 ly competent to stand trial shall not prejudice the defendant
22 in raising the issue of his insanity as a defense to the offense
23 charged, and shall not be admissible as evidence in a trial for
24 the offense charged.

1 **"§ 4242. Determination of the existence of insanity at the**
 2 **time of the offense**

3 “(a) Upon the filing of a notice, as provided in rule 12.2
 4 of the Federal Rules of Criminal Procedure, the court, upon
 5 motion of the attorney for the Government, may order that a
 6 psychiatric examination of the defendant be conducted, and
 7 that a psychiatric report be filed with the court, pursuant to
 8 the provisions of section 4247 (b) and (c).

9 “(b) If the issue of insanity is raised by notice as pro-
 10 vided in rule 12.2 of the Federal Rules of Criminal Procedure
 11 on motion of the defendant or of the attorney for the Govern-
 12 ment, or on the court’s own motion, the jury shall be in-
 13 structed to find, or, in the event of a nonjury trial, the court
 14 shall find, the defendant—

15 “(1) guilty;

16 “(2) not guilty; or

17 “(3) not guilty by reason of insanity.

18 **"§ 4243. Hospitalization of a person found not guilty by**
 19 **reason of insanity**

20 “(a) If a person is found not guilty by reason of insanity,
 21 the court shall order a hearing to determine whether the
 22 person is presently suffering from a mental disease or defect
 23 as a result of which his release would create a substantial
 24 danger to himself or to the person or property of another.
 25 The court may make any order reasonably necessary to
 26 secure the appearance of the person at the hearing.

1 “(b) Prior to the date of the hearing, the court may
2 order that a psychiatric examination of the defendant be con-
3 ducted, and that a psychiatric report be filed with the court,
4 pursuant to the provisions of section 4247 (b) and (c).

5 “(c) The hearing shall be conducted pursuant to the pro-
6 visions of section 4247(d).

7 “(d) If, after the hearing, the court finds by a preponder-
8 ance of the evidence that a person found not guilty by reason
9 of insanity is presently suffering from a mental disease or
10 defect as a result of which his release would create a sub-
11 stantial danger to himself or to the person or property of
12 another, the court shall commit the person to the custody of
13 the Attorney General. The Attorney General shall release
14 the person to the appropriate official of the State in which
15 the person is domiciled if such State will assume responsibili-
16 ty for his care, custody, and treatment. If such State will not
17 then assume such responsibility, the Attorney General shall
18 hospitalize the person for treatment in a suitable mental hos-
19 pital, or in another facility designated by the court as suit-
20 able, until such State will assume such responsibility or until
21 the person's mental condition is so improved that his release
22 would not create a substantial danger to himself or to the
23 person or property of another.

24 “(e) When the director of the facility in which a person
25 found not guilty by reason of insanity is hospitalized pursuant

1 to subsection (d) determines that the person has recovered
2 from his mental disease or defect to such an extent that his
3 release would no longer create a substantial danger to him-
4 self or to the person or property of another, he shall promptly
5 file a certificate to that effect with the clerk of the court that
6 ordered the commitment. The clerk shall send a copy of the
7 certificate to the person's counsel and to the attorney for the
8 Government. The court shall order the discharge of the
9 person or, on the motion of the attorney for the Government
10 or on its own motion, shall hold a hearing, conducted pursu-
11 ant to the provisions of section 4247(d), to determine wheth-
12 er he should be released. If, after the hearing, the court finds
13 by a preponderance of the evidence that the person has re-
14 covered from his mental disease or defect to such an extent
15 that his release would no longer create a substantial danger
16 to himself or to the person or property of another, the court
17 shall order his immediate discharge.

18 **"§ 4244. Hospitalization of a convicted person suffering**
19 **from mental disease or defect**

20 "(a) A defendant found guilty of an offense, or the attor-
21 ney for the Government, may, within ten days after the de-
22 fendant is found guilty, file a motion for a hearing on the
23 present mental condition of the defendant. The court shall
24 grant the motion, or at any time prior to the sentencing of
25 the defendant shall order such a hearing on its own motion, if

1 there is reasonable cause to believe that the defendant may
2 presently be suffering from a mental disease or defect for the
3 treatment of which he is in need of custody, care, or treat-
4 ment in a mental hospital.

5 “(b) Prior to the date of the hearing, the court may
6 order that a psychiatric examination of the defendant be con-
7 ducted, and that a psychiatric report be filed with the court,
8 pursuant to the provisions of section 4247 (b) and (c). In
9 addition to the information required to be included in the psy-
10 chiatric report pursuant to the provisions of section 4247(c),
11 if the report includes an opinion by the psychiatrists that the
12 defendant is presently suffering from a mental disease or
13 defect but that it is not such as to require his custody, care,
14 or treatment in a mental hospital, the report shall also in-
15 clude an opinion by the psychiatrists concerning the sentenc-
16 ing alternatives that could best accord the defendant the kind
17 of treatment he does need.

18 “(c) The hearing shall be conducted pursuant to the pro-
19 visions of section 4247(d).

20 “(d) If, after the hearing, the court is of the opinion that
21 the defendant is presently suffering from a mental disease or
22 defect and that he should, in lieu of being sentenced to proba-
23 tion or imprisonment, be committed to a mental hospital for
24 custody, care, or treatment, the court shall commit the de-
25 fendant to the custody of the Attorney General. The Attor-

1 ney General shall hospitalize the defendant for treatment in a
 2 suitable mental hospital, or in another facility designated by
 3 the court as suitable. Such a commitment constitutes a provi-
 4 sional sentence to the maximum term authorized for the of-
 5 fense of which the defendant was found guilty.

6 “(e) When the director of the facility in which the de-
 7 fendant is hospitalized pursuant to subsection (d) determines
 8 that the defendant has recovered from his mental disease or
 9 defect to such an extent that he is no longer in need of custo-
 10 dy, care, or treatment in a mental hospital, he shall promptly
 11 file a certificate to that effect with the clerk of the court that
 12 ordered the commitment. The clerk shall send a copy of the
 13 certificate to the defendant’s counsel and to the attorney for
 14 the Government. If, at the time of the filing of the certificate,
 15 the provisional sentence imposed pursuant to subsection (d)
 16 has not expired, the court shall hold a hearing, conducted
 17 pursuant to the provisions of section 4247(d), to determine
 18 whether the provisional sentence should be reduced. After
 19 the hearing, the court may order that the defendant be re-
 20 leased, be placed on probation, or be imprisoned for the re-
 21 mainder of the sentence or for any lesser term.

22 **“§ 4245. Hospitalization of an imprisoned person suffering**
 23 **from mental disease or defect**

24 “(a) A defendant serving a sentence of imprisonment, or
 25 an attorney for the Government at the request of the director

1 of the facility in which the defendant is imprisoned may file a
2 motion with the court for the district in which the facility is
3 located for a hearing on the present mental condition of the
4 defendant. The court shall grant the motion if there is rea-
5 sonable cause to believe that the defendant may presently be
6 suffering from a mental disease or defect for the treatment of
7 which he is in need of custody, care, or treatment in a mental
8 hospital. A motion filed under this subsection shall stay the
9 release of the defendant pending completion of procedures
10 contained in this section.

11 “(b) Prior to the date of the hearing, the court may
12 order that a psychiatric examination of the defendant be con-
13 ducted, and that a psychiatric report be filed with the court,
14 pursuant to the provisions of section 4247 (b) and (c).

15 “(c) The hearing shall be conducted pursuant to the pro-
16 visions of section 4247(d).

17 “(d) If, after the hearing, the court is of the opinion that
18 the defendant is presently suffering from a mental disease or
19 defect for the treatment of which he is in need of custody,
20 care, or treatment in a mental hospital, the court shall
21 commit the defendant to the custody of the Attorney Gener-
22 al. The Attorney General shall hospitalize the defendant for
23 treatment in a suitable mental hospital, or in another facility
24 designated by the court as suitable, until he is no longer in

1 need of custody, care, or treatment in a mental hospital or
2 until the expiration of his sentence of imprisonment.

3 “(e) When the director of the facility in which the de-
4 fendant is hospitalized pursuant to subsection (d) determines
5 that the defendant has recovered from his mental disease or
6 defect to such an extent that he is no longer in need of custo-
7 dy, care, or treatment in a mental hospital, he shall promptly
8 file a certificate to that effect with the clerk of the court that
9 ordered the commitment. The clerk shall send a copy of the
10 certificate to the defendant’s counsel and to the attorney for
11 the Government. If, at the time of the filing of the certificate,
12 the sentence imposed upon the defendant has not expired, the
13 court shall order that the defendant be reimprisoned.

14 **“§ 4246. Hospitalization of a person due for release but**
15 **suffering from mental disease or defect**

16 “(a) If the director of a facility in which a person is
17 hospitalized pursuant to this chapter certifies that a person
18 whose sentence is about to expire, or who has been commit-
19 ted to the custody of the Attorney General pursuant to sec-
20 tion 4241(d), or against whom all criminal charges have been
21 dropped, is presently suffering from a mental disease or
22 defect as a result of which his release would create a sub-
23 stantial danger to himself or to the person or property of
24 another, and that suitable arrangements for the custody and
25 care of the person are not otherwise available, he shall trans-

1 mit the certificate to the clerk of the court for the district in
2 which the person is confined. The clerk shall send a copy of
3 the certificate to the person, and to the attorney for the Gov-
4 ernment, and, if the person was committed pursuant to sec-
5 tion 4241(d), to the clerk of the court that ordered the com-
6 mitment. The court shall order a hearing to determine
7 whether the person is presently suffering from a mental dis-
8 ease or defect as a result of which his release would create a
9 substantial danger to himself or to the person or property of
10 another. A certificate filed under this subsection shall stay
11 the release of the person pending completion of procedures
12 contained in this section.

13 “(b) Prior to the date of the hearing, the court may
14 order that, a psychiatric examination of the defendant be con-
15 ducted, and that a psychiatric report be filed with the court,
16 pursuant to the provisions of section 4247 (b) and (c).

17 “(c) The hearing shall be conducted pursuant to the pro-
18 visions of section 4247(d).

19 “(d) If, after the hearing, the court finds by a preponder-
20 ance of the evidence that the person is presently suffering
21 from a mental disease or defect as a result of which his re-
22 lease would create a substantial danger to himself or to the
23 person or property of another, the court shall commit the
24 person to the custody of the Attorney General. The Attorney
25 General shall release the person to the appropriate official of

1 the State in which the person is domiciled if such State will
2 assume responsibility for his care, custody, and treatment. If
3 such State will not then assume such responsibility, the At-
4 torney General shall hospitalize the person for treatment in a
5 suitable mental hospital, or in another facility designated by
6 the court as suitable, until such State will assume such re-
7 sponsibility or until the person's mental condition is so im-
8 proved that his release would not create a substantial danger
9 to himself or to the person or property of another.

10 “(e) When the director of the facility in which a person
11 is hospitalized pursuant to subsection (d) determines that the
12 person has recovered from his mental disease or defect to
13 such an extent that his release would no longer create a sub-
14 stantial danger to himself or to the person or property of
15 another, he shall promptly file a certificate to that effect with
16 the clerk of the court that ordered the commitment. The
17 clerk shall send a copy of the certificate to the person's coun-
18 sel and to the attorney for the Government. The court shall
19 order the discharge of the person or, on the motion of the
20 attorney for the Government or on its own motion, shall hold
21 a hearing, conducted pursuant to the provisions of section
22 4247(d), to determine whether he should be released. If, after
23 the hearing, the court finds by the preponderance of the evi-
24 dence that the person has recovered from his mental disease
25 or defect to such an extent that his release would no longer

1 create a substantial danger to himself or to the person or
2 property of another, the court shall order his immediate dis-
3 charge.

4 **"§ 4247. General provisions for chapter 313**

5 “(a) As used in this chapter—

6 “(1) ‘insanity’ means a mental disease or defect as
7 a result of which a person lacked the state of mind re-
8 quired as an element of the offense charged; and

9 “(2) ‘mental disease or defect’ means an impair-
10 ment of mental functions sufficient to render a person
11 incapable of either distinguishing right from wrong, or
12 of conforming his conduct to the requirements of the
13 law.

14 “(b) A psychiatric examination ordered pursuant to this
15 chapter shall be conducted by at least two qualified psychia-
16 trists. The psychiatrists shall be—

17 “(1) designated by the court if the examination is
18 ordered under section 4241, 4242, 4243, or 4244; or

19 “(2) designated by the court, and shall include
20 one psychiatrist selected by the defendant, if the exam-
21 ination is ordered under section 4245 or 4246.

22 For the purpose of an examination pursuant to an order
23 under section 4241, 4242, 4243, or 4244, the court may
24 commit the person to be examined for a reasonable period,
25 but not more than sixty days, to the custody of the Attorney

1 General for placement in a suitable mental hospital or an-
2 other facility designated by the court as suitable.

3 “(c) A psychiatric report ordered pursuant to this chap-
4 ter shall be prepared by the psychiatrists designated to con-
5 duct the psychiatric examination, shall be filed with the court
6 with copies provided to the counsel for the person examined
7 and to the attorney for the Government, and shall include—

8 “(1) the person’s history and present symptoms;

9 “(2) a description of the psychological and medical
10 tests employed and their results;

11 “(3) the psychiatrists’ findings; and

12 “(4) the psychiatrists’ opinions as to diagnosis,
13 prognosis, and—

14 “(A) if the examination is ordered under sec-
15 tion 4241, whether the person is presently suffer-
16 ing from a mental disease or defect rendering him
17 mentally incompetent to the extent that he is
18 unable to understand the nature and consequences
19 of the proceedings against him or to assist proper-
20 ly in his defense;

21 “(B) if the examination is ordered under sec-
22 tion 4242, whether the person was insane at the
23 time of the offense charged;

24 “(C) if the examination is ordered under sec-
25 tion 4243 or 4246, whether the person is present-

1 ly suffering from a mental disease or defect as a
2 result of which his release would create a sub-
3 stantial danger to himself or to the person or
4 property of another; or

5 "(D) if the examination is ordered under sec-
6 tion 4244 or 4245, whether the person is present-
7 ly suffering from a mental disease or defect as a
8 result of which he is in need of custody, care, or
9 treatment in a mental hospital.

10 "(d) At a hearing ordered pursuant to this chapter the
11 person whose mental condition is the subject of the hearing
12 shall be represented by counsel and, if he is financially unable
13 to obtain adequate representation, counsel shall be appointed
14 for him. The person shall be afforded an opportunity to tes-
15 tify, to present evidence, to subpoena witnesses on his behalf,
16 and to confront and cross-examine witnesses who appear at
17 the hearing.

18 "(e) The director of the facility in which a person is
19 hospitalized pursuant to—

20 "(1) section 4241 shall prepare semiannual re-
21 ports; or

22 "(2) section 4243, 4244, 4245, or 4246 shall pre-
23 pare annual reports;

24 concerning the mental condition of the person and recommen-
25 dations concerning his continued hospitalization. The reports

1 shall be submitted to the court that ordered the person's com-
2 mitment to the facility and copies of the reports shall be sub-
3 mitted to such other persons as the court may direct.

4 “(f) Statements made by the defendant during the
5 course of a psychiatric examination pursuant to section 4241
6 or 4242 are not admissible as evidence against the accused
7 upon any issue except the issue of the presence or absence of
8 a mental disease or defect which is claimed by the defendant
9 to have negated the mental state required for the commission
10 of any crime charged.

11 “(g) Nothing contained in section 4243 or 4246 pre-
12 cludes a person who is committed under either of such sec-
13 tions from establishing by writ of habeas corpus his eligibility
14 for release under such sections.

15 “(h) The Attorney General—

16 “(1) may contract with a State, a locality, or a
17 private agency for the confinement, hospitalization,
18 care, or treatment of, or the provision of services to, a
19 person committed to his custody pursuant to this chap-
20 ter;

21 “(2) may apply for the civil commitment, pursuant
22 to State law, of a person committed to his custody pur-
23 suant to section 4243 or 4246; and •

1 “(3) shall consult with the Secretary of the De-
2 partment of Health and Human Services in the general
3 implementation of the provisions of this chapter.”.

(b) The first sentence of paragraph (a) of rule 12 of the Federal Rules of Criminal Procedure is amended by adding after “not guilty” the following: “, not guilty by reason of insanity”.

8 (c) Rule 12 is further amended by adding at the end
9 thereof the following new paragraph:

10 “(i) The plea of not guilty by reason of insanity shall be
11 entered pursuant to rule 12.2.”.

12 (d) Rule 12.2 of the Federal Rules of Criminal Proce-
13 dure is amended to read as follows:

14 "Rule 12.2.—Notice of Plea of Not Guilty by Reason of In-
15 sanity

16 “(a) If a defendant intends to rely upon the plea of not
17 guilty by reason of insanity, he shall, within the time pro-
18 vided for the filing of pretrial motions or at such later time as
19 the court may direct, notify the attorney for the government
20 in writing of such intention and file a copy of such notice with
21 the clerk. If there is a failure to comply with the require-
22 ments of this paragraph, the plea of not guilty by reason of
23 insanity may not be entered. The court may for cause shown
24 allow late filing of the notice or grant additional time to the

1 parties to prepare for trial or make such other order as may
2 be appropriate.

3 “(b) If a defendant intends to introduce expert testimony
4 relating to a mental disease, defect, or other condition bear-
5 ing upon the issue of whether he had the state of mind re-
6 quired for the offense charged, he shall, within the time pro-
7 vided for the filing of pretrial motions or at such later time as
8 the court may direct, notify the attorney for the government
9 in writing of such intention and file a copy of such notice with
10 the clerk. The court may for cause shown allow late filing of
11 the notice or grant additional time to the parties to prepare
12 for trial or make such other order as may be appropriate.

13 “(c) In an appropriate case the court may, upon motion
14 of the attorney for the government, order the defendant to
15 submit to a psychiatric examination as provided in section
16 4242 of title 18, United States Code, by at least two quali-
17 fied psychiatrists designated for this purpose in the order of
18 the court. No statement made by the accused in the course of
19 any examination provided for by this rule, whether the exam-
20 ination shall be with or without the consent of the accused,
21 shall be admitted in evidence against the accused on any
22 issue raised in such criminal proceeding, except the issue of
23 whether or not the defendant suffered from a mental disease
24 or defect which negated the intent required for the commis-
25 sion of the offense charged.

1 “(d) If there is a failure to give notice when required by
2 paragraph (b) or to submit to an examination when ordered
3 under paragraph (c), the court may exclude the testimony of
4 any expert witness offered by the defendant on the issue of
5 his state of mind.

6 “(e) A defendant is not guilty by reason of insanity if his
7 actions constitute all necessary elements of the offense
8 charged other than the requisite state of mind, and he lacked
9 the requisite state of mind as a result of mental disease or
10 defect.”.

11 DEPARTMENT OF JUSTICE INTERNAL OPERATING

12 PROCEDURES

13 SEC. 7. (a) Section 533 of title 28, United States Code,
14 is amended—

15 (1) in the section heading by inserting before the
16 period the following: “; investigative guidelines”;

17 (2) by inserting “(a)” before “The Attorney Gen-
18 eral”; and

19 (3) by adding at the end thereof the following:

20 “(b) The Attorney General may issue departmental poli-
21 cies, guidelines, and regulations concerning the investigation
22 and prosecution of criminal cases and related law enforce-
23 ment matters that shall be followed by every Federal law
24 enforcement officer, as defined by section 111 of title 18.
25 Nothing in any policies, guidelines, or regulations so promul-

1 gated shall create any substantive or procedural right inher-
 2 ing to the benefit of any individual, and no court shall have
 3 jurisdiction over a claim in any proceeding, including a
 4 motion to quash a subpoena, suppress evidence, or dismiss an
 5 indictment, based solely on an alleged failure to follow such
 6 policies, guidelines, or regulations as may be promulgated by
 7 the Attorney General.”.

8 (b) The section analysis of chapter 33 of title 28, United
 9 States Code, is amended by inserting before the period the
 10 following: “; investigative guidelines” at the end of the item
 11 relating to section 533.

12 SPECIAL PROSECUTOR

13 SEC. 8. (a) Chapter 39 of title 28 of the United States
 14 Code is amended—

15 (1) in section 591(a) by deleting “petty offense”
 16 which appear at the end of such section and inserting
 17 in lieu thereof the following: “, misdemeanor or petty
 18 offense”; and

19 (2) in section 592 by striking out all the material
 20 following subsection (a) and inserting in lieu thereof the
 21 following:

22 “(b)(1) If the Attorney General, upon completion of the
 23 preliminary investigation, finds that there is not probable
 24 cause to believe that conduct of the type described in subsec-
 25 tion (a) of this section has been, or is being engaged in, he

1 shall so notify the party or parties who provided the informa-
2 tion forming the basis for the investigation as well as any
3 individual who was a subject of such investigation. A record
4 of every such allegation of official misconduct, and all infor-
5 mation developed in the investigation of such allegation, to-
6 gether with a memorandum containing a summary of the in-
7 formation received and a summary of the results of the inves-
8 tigation conducted, shall be kept in the permanent records of
9 the Department of Justice and such information shall not be
10 revealed to any other individual outside the Department of
11 Justice without consent of the Office of the Attorney Gener-
12 al, or upon order of a court of appropriate jurisdiction.

13 “(2) If the Attorney General, upon completion of the
14 preliminary investigation, finds that there is probable cause
15 warranting further investigation or prosecution of persons al-
16 leged to have engaged in conduct described in section 591(a)
17 of this title, or if ninety days elapse from the receipt of the
18 information without a determination by the Attorney General
19 that the matter is so unsubstantiated as not to warrant fur-
20 ther investigation or prosecution, then the Attorney General
21 shall appoint a special prosecutor. The Attorney General
22 shall define the prosecutorial jurisdiction of the office of such
23 special prosecutor by and through such letters of appointment
24 as may be issued, and shall provide notice of the appointment
25 of such prosecutor and the extent of such prosecutorial juris-

1 diction to such parties, if any, as have made allegations of
2 official misconduct.

3 “(3) If—

4 “(A) after the filing of a memorandum under
5 subsection (b) of this section, the Attorney General
6 receives additional specific information about
7 the matter to which the memorandum related; and

8 “(B) the Attorney General determines after
9 such additional investigation as he may deem ap-
10 propriate, that such information warrants further
11 investigation or prosecution,

12 then the Attorney General shall, not later than ninety
13 days after receiving such additional information, ap-
14 point a special prosecutor in accordance with the provi-
15 sions of subsection (b)(2) of this section.

16 “(c) The Attorney General may require a special pros-
17 ecutor appointed under the provisions of this section to
18 accept referral of any matter that relates to a matter within
19 that special prosecutor’s prosecutorial jurisdiction.

20 “(d) The Attorney General’s determination under sub-
21 section (b) of this section to appoint a special prosecutor shall
22 not be reviewable in any court.”.

23 (b) Section 593 of title 28, United States Code, is
24 hereby repealed.

1 (c) Section 594(e) of title 28, United States Code, is
2 amended—

3 (1) by striking out “or the division of the court”
4 after “Attorney General” in the first sentence of such
5 subsection; and

6 (2) by striking out “as established by the division
7 of the court”.

8 (d) Section 595(b) of title 28, United States Code, is
9 amended—

10 (1) in paragraph (1) by striking out “division of
11 the court” and inserting in lieu thereof “Attorney Gen-
12 eral”;

13 (2) in paragraph (3)—

14 (A) by striking out all material which follows
15 the first sentence and inserting in lieu thereof the
16 following: “Any disclosure of matters occurring
17 before a grand jury shall be in accordance with
18 the provisions of rule 6(e) of the Federal Rules of
19 Criminal Procedure.”;

20 (B) by striking out “The division of the
21 court” and inserting in lieu thereof “The Attorney
22 General”; and

23 (C) by striking out “the division deems” and
24 inserting in lieu thereof “the Attorney General
25 deems”.

1 (e) Section 595(e) of title 28, United States Code, is
2 amended by—

3 (1) striking out the first sentence and inserting in
4 lieu thereof: "A majority of the majority party mem-
5 bers, or a majority of all nonmajority party members of
6 the Committee on the Judiciary of either the House of
7 Representatives or the Senate may request in writing
8 that the Attorney General appoint a special prosecu-
9 tor."; and

10 (2) striking out the second sentence and inserting
11 in lieu thereof the following: "Not later than thirty
12 days after the receipt of such a request, or not later
13 than fifteen days after the completion of a preliminary
14 investigation of the matter with respect to which the
15 request is made, whichever is later, the Attorney Gen-
16 eral shall provide written notification of any action the
17 Attorney General has taken in response to such re-
18 quest, and if no appointment has been made, why such
19 appointment was not made.".

20 (f) Section 596(a) of title 28, United States Code, is
21 amended—

22 (1) in paragraph (1) by inserting after "only for
23 extraordinary impropriety" the following: "constituting
24 an act of moral turpitude or bad faith execution of such
25 special prosecutor's responsibilities,";

1 (2) in paragraph (2) by striking out all material
2 which appears after "publishing any or all of the
3 report."; and

4 (3) in paragraph (3) by striking out "division of
5 the court" each place it appears and inserting in lieu
6 thereof the following: "appropriate Federal court,".

7 (g) Section 596(b) of title 28, United States Code, is
8 amended—

9 (1) in paragraph (1)—

10 (A) by striking out "An" and inserting in
11 lieu thereof "The"; and

12 (B) by inserting "a" before "special prosecu-
13 tor" each place it appears; and

14 (2) in paragraph (2)—

15 (A) by striking out "The division of the
16 court, either on its own motion or upon sugges-
17 tion of the" and inserting in lieu thereof "The";

18 (B) by striking out "terminate an" and in-
19 serting in lieu thereof "terminate the"; and

20 (C) by inserting "a" after "office of".

21 (h) Section 597 of title 28, United States Code, is
22 amended by inserting at the end thereof the following: "Upon
23 the appointment of a special prosecutor, the Attorney Gener-
24 al, and all officers and employees of the Department of Jus-
25 tice, shall deliver to such special prosecutor as soon as is

1 practical all information or materials within their knowledge
2 or possession concerning the matters which are within the
3 special prosecutor's jurisdiction."

4 (i) Section 49 of title 28, United States Code, is hereby
5 repealed.

6 **HABEAS CORPUS**

7 **SEC. 9.** (a) Section 2244 of title 28, United States
8 Code, is amended by adding at the end thereof the following
9 new subsections:

10 "(d) In a habeas corpus proceeding brought in behalf of
11 a person in custody pursuant to the judgment of a State
12 court, if the Federal question presented was properly pre-
13 sented under State law in the State court proceedings both at
14 trial and on direct appeal, or properly presented in a collat-
15 eral proceeding and disposed of exclusively on the merits, the
16 claim may not be considered or determined by a judge or
17 court of the United States, unless the petitioner establishes
18 that he is in custody in violation of the Constitution or laws
19 of the United States, that the alleged violation is of a Federal
20 right which has as its primary purpose the protection of the
21 reliability of either the factfinding process at the trial or the
22 appellate process on appeal, and was prejudicial to the peti-
23 tioner as to his guilt or punishment; and that the claimed
24 constitutional or statutory violation presents a substantial
25 question—

1 “(1) which was not theretofore raised and deter-
2 mined, and

3 “(2) which there was no fair and adequate oppor-
4 tunity theretofore to raise and have determined.

5 “(e) No petition filed in behalf of a person in custody
6 pursuant to the judgment of a State court shall be considered
7 or determined by a judge or court of the United States if it is
8 not filed within three years from the date the State court
9 judgment and sentence became final under State law, unless
10 the Federal right asserted did not exist at the time of the
11 State court trial and that right has been determined to be
12 retroactive, or the violation of an existing right was not, and
13 could not have been (in the exercise of reasonable diligence)
14 known to the petitioner within three years after the date the
15 judgment and sentence became final under State law. In such
16 case, the petition may be entertained within three years from
17 the date said violation or right was determined to exist.”.

18 (b) Section 2254(d) of title 28, United States Code, is
19 amended to read as follows:

20 “(d) In any proceeding instituted in a Federal court by
21 an application for a writ of habeas corpus by a person in
22 custody pursuant to the judgment of a State court, a determi-
23 nation, after a hearing, on the merits of a factual issue, which
24 is made by a State court of competent jurisdiction in a pro-
25 ceeding to which the applicant for the writ and the State or

1 an officer or agent thereof were parties, which determination
2 is evidenced by written findings, opinion, or other reliable
3 and adequate written indicia, shall not be redetermined or
4 relitigated by a judge or court of the United States, unless
5 the applicant shall establish or it shall otherwise appear, or
6 the respondent shall admit—

7 “(1) that the merits of the factual dispute were
8 not addressed in the State court hearing;

9 “(2) that the factfinding procedure employed by
10 the State court was not adequate to afford a full and
11 fair hearing;

12 “(3) that the material facts could not be developed
13 at the State court hearing;

14 “(4) that the State court lacked jurisdiction of the
15 subject matter or over the person of the applicant in
16 the State court proceeding;

17 “(5) that the applicant was an indigent and the
18 State court, in deprivation of his constitutional right,
19 failed to appoint counsel to represent him in the State
20 court proceeding; or

21 “(6) that unless that part of the record of the
22 State court proceeding in which the determination of
23 such factual issue was made, pertinent to a determina-
24 tion of the sufficiency of the evidence to support such
25 factual determination, is produced as provided for here-

1 inafter, and the Federal court on a consideration of
 2 such part of the record as a whole concludes that there
 3 is no evidence to support such finding.

4 No evidentiary hearing may be conducted in the Federal
 5 court when the State court records demonstrate the factual
 6 issue was litigated and determined, unless the existence of
 7 one or more of the circumstances respectively set forth in
 8 paragraphs numbered (1) to (6), inclusive, is shown by the
 9 applicant. The Federal court may further designate a United
 10 States magistrate to consider the motion in the first instance
 11 and prepare a statement of facts and proposed findings of law
 12 and fact for the court hearing the petition to consider in issu-
 13 ing a final determination upon the motion.”.

14 (c) Section 2255 of title 28, United States Code, is
 15 amended to read as follows:

16 **“§ 2255. Federal custody; remedies on motion attacking**
 17 **sentence**

18 “(a) A prisoner in custody under a sentence imposed by
 19 a court established by an Act of Congress may move such
 20 court to vacate, set aside, or correct the sentence, if—

21 “(1)(A) he is in custody in violation of the Consti-
 22 tution of the United States,

23 “(B) the claimed constitutional violation presents
 24 a substantial question—

1 “(i) which was not theretofore raised and de-
2 termined, and

3 “(ii) which there was no fair and adequate
4 opportunity theretofore to raise and have deter-
5 mined, and

6 “(C) the claimed constitutional violation is of a
7 right which has as its primary purpose the protection
8 of the reliability of either the factfinding process at the
9 trial or the appellate process on appeal from the judg-
10 ment of conviction, and was prejudicial to the petition-
11 er as to his guilt or punishment;

12 “(2) he is in custody in violation of the laws of
13 the United States;

14 “(3) the sentence was imposed in violation of the
15 laws of the United States;

16 “(4) the court was without jurisdiction to impose
17 such sentence; or

18 “(5) the sentence is otherwise subject to collateral
19 attack.

20 “(b) A motion for such relief may be made at any time
21 within three years after a conviction is final, or within three
22 years after the discovery of error providing the basis for the
23 requested relief, which error was not, and could not (in the
24 exercise of reasonable diligence) have been known to the pe-
25 titioner within three years after the date the conviction

1 became final or within three years after the rendition of a
2 decision regarding matters of law affecting the conviction
3 from which relief is sought.

4 “(c) Unless the motion and the files and records of the
5 case conclusively show that the prisoner is entitled to no
6 relief, the court shall cause notice thereof to be served upon
7 the United States attorney, grant a prompt hearing thereon,
8 determine the issues and make findings of fact and conclu-
9 sions of law with respect thereto. If the court finds that the
10 judgment was rendered without jurisdiction, or that the sen-
11 tence imposed was not authorized by law or is otherwise
12 open to collateral attack, or that there has been a denial or
13 infringement of the constitutional rights of the prisoner as
14 described in subsection (a) of this section, the court shall dis-
15 charge the prisoner, resentence him, grant a new trial, or
16 correct the sentence as may appear appropriate.

17 “(d) A court may entertain and determine such motion
18 without requiring the production of the prisoner at the hear-
19 ing. The court may further designate a United States magis-
20 trate to consider the motion in the first instance and prepare
21 a statement of facts and proposed findings of law and fact for
22 the court which imposed the sentence (or other court review-
23 ing the matter) to consider in issuing a final determination
24 upon the motion.

1 “(e) The sentencing court shall not be required to enter-
2 tain a second or successive motion for similar relief on behalf
3 of the same prisoner.

4 “(f) An appeal may be taken to the court of appeals
5 from the order entered on the motion in accordance with sec-
6 tion 2253 of this title.

7 “(g) An application for a writ of habeas corpus on behalf
8 of a prisoner who is authorized to apply for relief by motion
9 pursuant to this section, shall not be entertained if it appears
10 that the applicant has failed to apply for relief, by motion, to
11 the court which sentenced him or that such court has denied
12 him the relief sought, unless it also appears that the remedy
13 by motion is inadequate or ineffective to test the legality of
14 his detention.”.

15

JUVENILE CRIME

16 SEC. 10. Section 5032 of title 18, United States Code,
17 is amended to read as follows:

18 “§ 5032. Delinquency proceedings in district courts: Treat-
19 ment of juveniles as adults for purposes of
20 criminal prosecution

21 “(a) A juvenile alleged to have committed an act of ju-
22 venile delinquency which if committed by an adult would be a
23 felony shall not be proceeded against in any court of the
24 United States unless the Attorney General, after investiga-
25 tion, certifies to an appropriate district court of the United

1 States that the juvenile court or other appropriate district
2 court of a State (1) does not have jurisdiction or refuses to
3 assume jurisdiction over said juvenile with respect to such
4 alleged act of juvenile delinquency, or (2) does not have
5 available programs and services adequate for the needs of
6 juveniles, or (3) that the offense charged, if committed by an
7 adult, would be a felony punishable by a maximum penalty of
8 five years imprisonment or more, and there is a special inter-
9 est warranting Federal prosecution. If the Attorney General
10 does not so certify, such juvenile shall be surrendered to the
11 appropriate legal authorities of such State.

12 “(b) If an alleged juvenile delinquent is not surrendered
13 to the authorities of a State or the District of Columbia pur-
14 suant to this section, any proceedings against him shall be in
15 an appropriate district court of the United States. For such
16 purposes, the court may be convened at any time and place
17 within the district, in chambers or otherwise. The Attorney
18 General shall proceed by information, and no criminal pros-
19 ecution shall be instituted for the alleged act of juvenile delin-
20 quency except as provided below.

21 “(c) A juvenile who is alleged to have committed an act
22 of juvenile delinquency and who is not surrendered to State
23 authorities shall be proceeded against under this chapter
24 unless he has requested in writing upon advice of counsel to
25 be proceeded against as an adult, except that, with respect to •

1 a juvenile sixteen years and older alleged to have committed
2 an act after his sixteenth birthday which if committed by an
3 adult would be a felony punishable by a maximum penalty of
4 ten years imprisonment or more, life imprisonment, or death,
5 criminal prosecution on the basis of the alleged act may be
6 begun by motion to transfer of the Attorney General in the
7 appropriate district court of the United States, if such court
8 finds, after hearing, such transfer would be in the interest of
9 justice. In such cases, the juvenile shall be considered an
10 adult for purposes of prosecution and disposition except that
11 no juvenile convicted as an adult shall be placed or retained
12 in an adult jail or correctional institution in which he has
13 regular contact with adults incarcerated because they have
14 been convicted of a crime or are awaiting trial on criminal
15 charges.

16 “(d) Evidence of the following factors shall be consid-
17 ered, and findings with regard to each factor shall be made in
18 the record, in assessing whether a transfer would be in the
19 interest of justice: the nature of the alleged offense; the
20 extent and nature of the juvenile’s prior delinquency record;
21 the nature of past treatment efforts and the juvenile’s re-
22 sponse to such efforts; and whether juvenile disposition will
23 reflect the seriousness of the juvenile’s conduct, promote re-
24 spect for the law, promote the protection of the public from

1 the juvenile's conduct, and provide a just response to the
2 conduct of the juvenile.

3 “(e) Reasonable notice of the transfer hearing shall be
4 given to the juvenile, his parents, guardian, or custodian and
5 to his counsel. The juvenile shall be assisted by counsel
6 during the transfer hearing, and at every other critical stage
7 of the proceedings.

8 “(f) Once a juvenile has entered a plea of guilty or the
9 proceeding has reached the stage that evidence has begun to
10 be taken with respect to a crime or an alleged act of juvenile
11 delinquency subsequent criminal prosecution or juvenile pro-
12 ceedings based upon such alleged act of delinquency shall be
13 barred.

14 “(g) Statements made by a juvenile prior to or during a
15 transfer hearing under this section shall not be admissible at
16 subsequent criminal prosecutions.”.

17 FREEDOM OF INFORMATION ACT

18 SEC. 11. (a) Section 552(a) of title 5, United States
19 Code, is amended—

20 (1) by striking out the material before clause (1)
21 and inserting in lieu thereof the following:

22 “(a) Each agency shall make available to any United
23 States person the following information:”;

24 (2) in paragraph (3) by inserting before the period
25 at the end thereof the following: “: *Provided, however,*

1 That this section shall not be construed to require a
2 law enforcement or national security intelligence
3 agency to disclose information to any person requesting
4 such disclosure on behalf of an individual who is not a
5 United States person as defined in this section”;

6 (3) in paragraph (4)(B) by inserting before the
7 period the following: “, but if the court examines the
8 contents of a law enforcement or national intelligence
9 agency’s records withheld by the agency pursuant to
10 subsection (b)(1), (b)(3), or (b)(7), the examination shall
11 be in camera. The court shall maintain under seal any
12 affidavit submitted by a law enforcement or intelligence
13 agency to the court in camera”;

14 (4) in paragraph (6)(A) by striking out clause (i)
15 and inserting in lieu thereof the following:

16 “(i) notify the person making the request of the
17 receipt of the request and notify such person within
18 thirty days after the receipt of such request of the
19 number of pages encompassed by the request and the
20 time limits imposed by this subsection upon the agency
21 for responding to the request; determine whether to
22 comply with the request and notify the person making
23 the request of such determination and the reasons
24 therefor within sixty days after the receipt of such re-
25 quest (excepting Saturdays, Sundays, and legal public

1 holidays) if the request encompasses less than two hun-
2 dred pages of records with an additional sixty days
3 permitted for each additional two hundred pages of rec-
4 ords encompassed by the request, but all determina-
5 tions and notifications shall be made within one year;
6 and notify the person making the request of the right
7 of such person to appeal to the head of the agency an
8 adverse determination; and"; and

9 (5) in paragraph (6)(C)—

10 (A) by striking out "in responding to" and
11 inserting in lieu thereof "in attempting to respond
12 to"; and

13 (B) by inserting "shall" before "allow".

14 (b) Section 552(b) of title 5, United States Code, is
15 amended—

16 (1) in paragraph (2) by adding ", including such
17 materials as (A) manuals and instructions to investiga-
18 tors, inspectors, auditors, and negotiators, and (B) ex-
19 amination material used solely to determine individual
20 qualifications for employment, promotion, and licens-
21 ing" after "agency";

22 (2) by amending paragraph (6) to read as follows:

23 "(6) records or information concerning individuals
24 the release of which would constitute an unwarranted

1 invasion of personal privacy, including compilations or
2 lists of names and addresses of agency personnel;"

3 (3) in paragraph (7)—

4 (A) in the introductory language—

5 (i) by striking out "investigatory rec-
6 ords" and inserting in lieu thereof "records
7 or information"; and

8 (ii) by adding "or information" after
9 "such records";

10 (B) by amending subparagraph (A) to read as
11 follows:

12 "(A) reveal investigatory information relating
13 to an ongoing investigation or enforcement pro-
14 ceeding,";

15 (C) by amending subclauses (D), (E), and (F)
16 to read as follows: "(D) tend to disclose the iden-
17 tity of a confidential source, including any foreign,
18 State, or other public agency or authority or any
19 private institution that furnished information on a
20 confidential basis; and, in the case of a record or
21 information compiled by a criminal law enforce-
22 ment authority in the course of a criminal investi-
23 gation, or by an agency conducting a lawful na-
24 tional security intelligence investigation, informa-
25 tion furnished by a confidential source; (E) dis-

1 close techniques, procedures, guidelines, or prior-
2 ities for law enforcement investigations or pros-
3 ecutions; (F) endanger the life or physical safety
4 of any natural person; or"; and

5 (D) by adding the following new subclause at
6 the end thereof: "(G) disclose information relating
7 to such categories of investigations of terrorism,
8 organized crime, or foreign counterintelligence as
9 are exempted by the Attorney General by regula-
10 tion or order;"; and

11 (4) by striking out all the material after paragraph
12 (9) and inserting in lieu thereof the following:

13 "Any reasonably segregable portion of a record not already
14 in the public domain which contains information pertaining to
15 the subject of a request shall be provided to any person prop-
16 erly requesting such record after the portions which are
17 exempt under this subsection have been deleted. Each
18 agency which carries out law enforcement or national secu-
19 rity intelligence functions shall prepare and furnish the same
20 general standardized written response for issuance to any
21 person making a request for records under this section to be
22 used both in cases where the agency does not have the rec-
23 ords requested and in cases where the records are protected
24 from disclosure because disclosure would reveal that a crimi-
25 nal investigation concerning the person is in progress."

1 (c) Section 552(d) of title 5, United States Code, is
2 amended—

3 (1) by striking out "March 1" each place it ap-
4 pears and inserting in lieu thereof "December 1", and

5 (2) by striking out "prior calendar year" in the
6 material following paragraph (7) and inserting in lieu
7 thereof "prior fiscal year".

8 (d) Subsection (e) is amended to read as follows:

9 "(e) For purposes of this section—

10 "(1) the term 'agency' as defined in section
11 551(1) of this title includes any executive department,
12 military department, Government corporation, Govern-
13 ment controlled corporation, or other establishment in
14 the executive branch of the Government (including the
15 Executive Office of the President), or any independent
16 regulatory agency;

17 "(2) the term 'foreign intelligence' means informa-
18 tion relating to the capabilities, intentions, and activi-
19 ties of foreign powers, organizations, or persons;

20 "(3) the term 'foreign counterintelligence' means
21 information gathered and activities conducted to pro-
22 tect against espionage and other clandestine intelli-
23 gence activities, sabotage, international terrorist activi-
24 ties or assassinations conducted for or on behalf of for-
25 eign powers, organizations, or persons;

1 “(4) the term ‘terrorism’ means any activity that
2 involves a violent act that results in or risks serious
3 bodily harm to any individual or aggravated property
4 destruction and that is done for the purpose of—

5 “(A) intimidating or coercing the civil popu-
6 lation or any segment thereof;

7 “(B) influencing or retaliating against the
8 policies or actions of the Government of the
9 United States or of any State or political subdivi-
10 sion thereof or of any foreign state; or

11 “(C) influencing or retaliating against the
12 trade or economic policies or actions of a corpora-
13 tion or other entity engaged in foreign commerce;

14 “(5) the term ‘organized crime’ means criminal
15 activity by two or more persons who are engaged in a
16 continuing enterprise for the purpose of obtaining mon-
17 etary or commercial gains or profits wholly or in part
18 through racketeering activity as defined in section
19 1961 of title 18, United States Code;

20 “(6) the terms ‘law enforcement agency’ and ‘na-
21 tional security intelligence agency’ for the purposes of
22 this section shall mean—

23 “(A) those divisions of the Department of
24 Justice which have responsibility for criminal law
25 enforcement, foreign intelligence, and foreign

1 counterintelligence investigations and prosecu-
2 tions; the Secret Service and Alcohol, Tobacco,
3 and Firearms Division of the Department of the
4 Treasury; the Central Intelligence Agency; the
5 Defense Intelligence Agency; any foreign intelli-
6 gence component of the Department of Defense;
7 and

8 "(B) any agency, not listed in subsection
9 (e)(6)(A) above, which may be designated by the
10 Congress as one having investigatory responsibil-
11 ities in the areas of criminal law enforcement, for-
12 eign intelligence, or foreign counterintelligence;
13 and

14 "(7) the term 'United States person' means a citi-
15 zen of the United States or an alien lawfully admitted
16 for permanent residence (as defined in section
17 101(a)(20) of the Immigration and Nationality Act, 8
18 U.S.C. 1101(a)(20)), an unincorporated association a
19 substantial number of members of which are citizens of
20 the United States or aliens lawfully admitted for per-
21 manent residence, or a corporation which is domiciled
22 in the United States; but such term shall not include a
23 corporation or an association that is a foreign power,
24 as defined in section 101(a) of the Foreign Intelligence
25 Surveillance Act of 1978 (50 U.S.C. 1801(a)).".

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF DAVID L. ARMSTRONG

President, National District Attorneys Association
and
Commonwealth Attorney, Jefferson County (Louisville), Kentucky
on
The Fourth Amendment Exclusionary Rule
(S. 101 and S. 751)

As President of the National District Attorneys Association, I am pleased to submit the following statement relative to our views on proposed Senate modifications of the so-called "exclusionary rule." In that connection, the Association adopts the recommendation of the Attorney General's Task Force on Violent Crime for a "good faith" exception to the existing rule. In essence, our position is that even "if the constable has blundered," the exclusionary rule should not be applied where the actions of the police were taken in a reasonable, good faith belief that such conduct was lawful.

Without attempting to belabor the well-known origins of the exclusionary rule, suffice it to say that it is a judicially created rule of law. The Fourth Amendment of the federal Constitution makes no mention of such a rule or its consequences. The Amendment provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Clearly, the Fourth Amendment not only does not provide for the exclusion of evidence, it does not even define what is meant by "unreasonable search and seizure." Such interpretations and definitions have resulted from a myriad of Supreme Court and lower court decisions dealing with search and seizure issues over the years.

For over a hundred years of our constitutional existence, the admission of evidence was unaffected by the legality of its procurement. Courts, at that time, were unwilling to forego the use of clearly probative evidence or to confuse the trial with collateral issues relating to the way in which it was obtained. And, even today, no other civilized nation in the world questions the admissibility of otherwise legally acceptable evidence. As Chief Justice Burger put it, "This evidentiary rule is unique to American Jurisprudence. Although the English and Canadian legal systems are highly regarded, neither has adopted our rule."

Originally imposed by the Supreme Court in the Weeks decision of 1914, the exclusionary rule was an attempt to deter unlawful police conduct and prevent courts from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold." Initially restricted to federal courts, the rule was broadened in scope 47 years later when the decision in Mapp v. Ohio (1961) applied it to the states. The present view of the rule is best described in the Supreme Court's Calandra decision of 1974 wherein it was stated that the "rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (emphasis supplied)

In view of the stated purpose of the rule, the question naturally arises whether the exclusion of evidence really deters illegal police conduct. The answer, in the negative, was clearly stated by the Chief Justice who pointed out that "...there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials." In fact, it might be argued that the rule is designed to deter the prosecutor more than the police since it is the former rather than the latter who must abide by the ruling of the Court.

As spelled out in Judge Malcolm Wilkey's very incisive article, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," there is a heavy price to be paid by society for whatever deterrent effect the rule has on law enforcement. Some of the disadvantages listed by Judge Wilkey include:

- 1) The Rule releases many otherwise guilty persons, some of whom are dangerous or violent;
- 2) It diminishes public respect for the legal and judicial system;
- 3) It fails to distinguish between more and less serious crimes or between willful, flagrant violations by an officer and "good faith" errors committed in difficult circumstances;
- 4) It excludes the most credible kinds of evidence;
- 5) It intensifies plea bargaining since a questionable search may well be one of the bargaining points between prosecution and defense; and
- 6) The rule tends to push the judiciary toward dangerously expanded notions of what is a legal search in order to admit evidence which judges are reluctant to suppress.

In the face of such enormous costs, we suggest that Congress reappraise the value of a rule which, at best, offers only a doubtful deterrence to law enforcement.

Proposed Modifications

Although modifications of the rule have been suggested or implied by the Supreme Court in several recent decisions, the Court apparently prefers such action to arise from legislation. As far as a "good faith" limitation on the rule is concerned, the Court has expressly encouraged such a change in Michigan v. Tucker and U.S. v. Peltier. Thus, it is apparent that the time is ripe for implementation of the Court's own expression.

Accordingly, the National District Attorneys Association concurs in the view of the Task Force that Congress should adopt a limitation of the rule in conformity with the decision of the Fifth Circuit in U.S. v. Williams (1980). There a construction of the exclusionary rule was adopted which would allow admission at trial of evidence seized during a search undertaken in a reasonable and good faith belief on the part of a federal officer that his conduct was lawful. Following Williams, the highest courts of New York and Kentucky have seen fit to adopt a similar approach. Thus, as can be seen, judicial fiat exists both state and federal to support such legislation.

We agree with the Task Force that procurement of a search or arrest warrant before a neutral and detached magistrate should be accorded "prima facie" weight in the determination of "good faith." However, it is in the area of warrantless arrests and searches that the real problem

of determining the intentions of the law enforcement agents arises. Possibly a "reasonable suspicion" standard as used in "stop and frisk" situations under Terry v. Ohio should be utilized. Under this approach, suggested by Wayne W. Schmidt, Esq., Executive Director of Americans for Effective Law Enforcement, Inc., even if the officer lacked probable cause, a determination of "reasonable suspicion" might justify the actions and allow otherwise admissible evidence to be used.

Conclusion

In conclusion, we feel, at a minimum, that the presently existing exclusionary rule be modified to incorporate a "good faith" exception. In this way, valuable evidence would be preserved even "where the constable blundered" and the overall interests of the administration of justice enhanced.



COUNTY OF LOS ANGELES

OFFICE OF THE DISTRICT ATTORNEY

18000 CRIMINAL COURTS BUILDING

210 WEST TEMPLE STREET

LOS ANGELES, CALIFORNIA 90012

974-3501

JOHN K. VAN DE KAMP, DISTRICT ATTORNEY

March 18, 1982

Mr. Michael Klipper
Chief Counsel
Subcommittee on Criminal Law
Committee on the Judiciary
United States Senate
162 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Klipper:

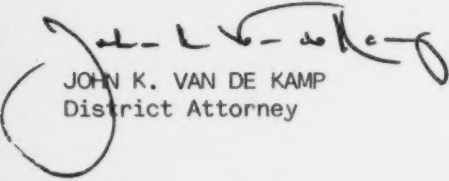
I regret that I am unable to attend the Subcommittee's final hearing on the exclusionary rule.

I am enclosing a copy of an article which I wrote in 1980 on the subject, as well as a position paper relating to SCA 7, a California Constitutional Amendment which we have sought to put the California exclusionary rule on the Federal standard.

SCA 7 has passed the California Senate and is awaiting a now-scheduled June vote in a committee of the California Assembly.

I hope these are of some help.

Yours very truly,


JOHN K. VAN DE KAMP
District Attorney

em

- Enclosures

The Exclusionary Rule Promises Not Kept — Proposed Alternatives

By John K. Van de Kamp

The exclusionary rule symbolizes the manner in which attorneys and the courts have allowed technicalities to triumph over the search for truth.



John K. Van de Kamp is the district attorney for the County of Los Angeles. He gratefully acknowledges the generous assistance of Los Angeles County Deputy District Attorneys Ronald Bowers and Richard J. Chrystie in the preparation of this article. The March 2, 1980, "60 Minutes" television segment on the Exclusionary Rule was produced with their help.

Introduction

Criticism of the exclusionary rule is not new. A trip to the law library will quickly reveal that the exclusionary rule has had its detractors ever since the publication of *Weeks v. United States*¹ in 1914. Since then, there have been hundreds — perhaps thousands — of articles printed dealing with the exclusionary rule. Some favor it; some oppose it. But through it all, the exclusionary rule has been the subject of controversy.

Recently, the debate regarding the exclusionary rule has intensified. Chief Justice Warren Burger strongly criticized the exclusionary rule in his now famous dissent in the case of *Bivens v. Six Unknown Agents*.² The publication, *Judicature*, printed a debate between Judge Malcolm Wilkey of the U.S. Court of Appeals for the District of Columbia, who is against the rule, and University of Michigan Law School Professor Yale Kamisar, who supports the rule.³ Attorney General George Deukmejian and legal scholar Bernard E. Witkin have also written recently of their opposition to the exclusionary rule.⁴

The rule is not only a legal issue — it is an emotional one as well. There are those to whom the exclusionary rule stands as a symbol of our commitment to protect the citizens of this country against overreach and abuse by law enforcement officers. On the other hand, there are many people to whom the exclusionary rule symbolizes the manner in which attorneys and the courts have

allowed technicalities to triumph over the search for truth. More recently, as the public's interest in the criminal justice system has grown, an increasing number of persons have expressed their disenchantment with the rule.

It is, therefore, an appropriate time to take another look at the exclusionary rule in the cold light of day and see how it has actually worked out in practice since 1914.

A review of the rule's application and development leads to the following conclusions:

- It has failed to live up to the expectations of those who framed it.

- Despite the dramatic improvement in police professionalism, the rule itself is of questionable effectiveness in deterring instances of improper police conduct.

- The statutory rules and case law governing search and seizure have become so complex and change so frequently that no law enforcement officer can be reasonably expected to know them in their entirety. This is also true of the rules governing arrest, confessions, line-ups and other areas of police procedure where the exclusionary rule comes into play.

- As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction — if it can be obtained at all — can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

An analysis of the rule's workings must begin with a review of its expectations and a determination of whether or not those expectations have been met.

And if they have not been met, what then? In the following paragraphs you'll read some of the rather surprising expectations for the rule and some of the proposed alternatives.

March/April 1980

PROSECUTOR'S BRIEF

Expectations

What were the expectations of those who framed the exclusionary rule?

How did they think it was going to work?

In 1955, the California Supreme Court adopted the exclusionary rule in the case of *People v. Cohen*.⁸ The court, and Chief Justice Traynor in particular, wrote extensively about their hopes for the rule.

The court observed, "We are not unmindful of the contention that the federal exclusionary rule has been arbitrary in its application and has introduced needless confusion into the law of criminal procedure."⁹ (Emphasis added.)

The court further asserted, "if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them."¹⁰ (Of course, those "needless limitations" became applicable to California in 1961 in *Mapp v. Ohio*.⁹)

At the heart of the *Cohen* decision was an optimism which has not been justified by recent history:

"[T]he adoption of the exclusionary rule need not introduce confusion in the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures..." (Emphasis added.)¹⁰

But workable rules have not been developed. Instead, search and seizure law has become even more complex and uncertain over the years. Court of Appeal Justice Macklin Fleming wrote in his book, *Of Crimes and Rights*, "The uncertainty is so great that even skilled criminal lawyers cannot predict with accuracy the application of exclusionary rules in a particular hearing."¹²

Lawyers, of course, may turn to law books and compendiums which provide monthly revisions and updates of the latest nuances. But for the policeman, search and seizure law today is so complex and so changing as to be virtually unlearnable. Given the present state of search and seizure law, the first order of business must be the development of a search and seizure code that is reasonable, teachable, learnable and, to the maximum extent possible, impervious to alteration.

Cohen made some other interesting predictions about the operation of the exclusionary rule.

"If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction."¹⁴ (Emphasis added.)

Yet, twenty-five years later, highly probative evidence is excluded every day. And an enormous amount of court time is spent solely on litigating motions to exclude evidence.

Cohen also said that if the exclusion-

ary rule were adopted, there would be no reason why "appropriate exceptions" could not be developed to permit the introduction of evidence in situations involving "minor intrusions of privacy" or

technicalities rather than being held responsible for their crimes.

Cohen's expectations regarding the operation of the exclusionary rule have not been met. Yet, the rule not only lives,

The first order of business must be the development of a search and seizure code that is reasonable, teachable, learnable and, to the maximum extent possible, impervious to alteration.

"good faith mistakes of judgment on the part of police officers."¹²

Again, the optimism was painfully misplaced. The courts make no effort to draw distinctions between gradations of improper police conduct, nor is any effort made to draw a balance between the improper police conduct and the seriousness of the charged crime.

Has the exclusionary rule deterred improper police conduct? Studies have been conducted attempting to measure the deterrent effect of the exclusionary rule. The conclusion drawn by Chief Justice Burger in the *Bivens* case and other researchers is that there is little empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials.¹³

This is not surprising since the exclusionary rule applies no sanction directly against officers engaging in improper conduct. Indeed, officers are usually not even present when a ruling to exclude evidence is made and may not understand what they did wrong if they ever do learn of the ruling.

Another argument frequently advanced in favor of the exclusionary rule embraces what might be called the "judicial integrity" rationale. It is claimed that even if the exclusionary rule does not deter illegal police conduct, the courts should still not admit illegally obtained evidence because doing so would be condoning official lawlessness and bring the court system into disrepute. Here is what *Cohen* said about this:

"[I]f courts respect the constitutional provisions by refusing to sanction their violation, they will not only command the respect of law-abiding citizens for themselves adhering to the law, they will also arouse public opinion as a deterrent to lawless enforcement of the law by bringing just criticism to bear on law enforcement officers who allow criminals to escape by pursuing them in lawless ways."¹⁴ (Emphasis added.)

This is backwards. The public blames the courts — not the police — for releasing criminals on technicalities. One of the reasons our criminal courts are in such disrepute today is that the public perceives them as a place where many clearly guilty people are freed on

it continues to expand by geometric proportions. It is clearly time to roll up our sleeves and develop better means to meet the purposes which the exclusionary rule was intended to serve.

Towards An Alternative

First, whether or not an acceptable alternative is adopted, an effort must be made to formulate reasonable and understandable black letter rules for police officers to follow. Such rules could be developed by a law revision commission made up of judges, attorneys, prosecutors, law enforcement representatives, and other interested parties.¹⁵ It's goal would be to develop a code of conduct for law enforcement officers which might well become part of the California Constitution — a code of basic conduct which every officer could be expected to know, understand and follow.

Second, in devising an alternative, sanctions should be designed to fit the violation. Under present law, no distinction is made between gradations of improper police conduct. The present sanction — exclusion of evidence — is the same whether the police misconduct was minor and unintentional or whether it was deliberate and outrageous. A key to any acceptable substitute is the concept of proportionality. Surely the sanctions — whatever they may be — should be commensurate with the violation.

A review of the alternatives which have been suggested follows. Like the exclusionary rule, nearly every one of them has offsetting weaknesses.

THE ALI "SUBSTANTIAL VIOLATION TEST"¹⁶ — This test calls for the exclusion of evidence only if the evidence was obtained as a result of a "substantial violation" of proper police practices. Some of the factors to be considered in determining whether a substantial violation has occurred would be the importance of the particular interest violated, the extent of deviation from lawful conduct, the extent to which the violation was wilful, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent future police misconduct and whether, but for the violation, the things seized would have been discovered.

Advantages: This test would take minor and technical violations out from under the exclusionary rule. It would spare us from the situations where murderers go free because the policeman made some inadvertent good faith error during his or her investigation. It would also be unlikely that the courts would exclude evidence in a case in which a new principle governing police conduct was announced since the officer would not have deviated from lawful conduct at the time he gathered the evidence so that his violation of the newly announced rule would not have been knowing and willful.

Disadvantages: Despite the criteria set forth for determining what is and what is not a substantial violation, the subjectivity of this issue is apt to lead to wide divergence in implementation. A minor violation to one judge may be a substantial violation to another. This will inevitably result in numerous appeals and a growing body of case law attempting to define what constitutes a substantial violation. Since certain subjective factors, such as the police officer's intent, are considered in determining substantiality, the case law on the substantial violation issue is apt to be even more confusing and offer less guidance to officers than existing law.

For example: Suppose an officer opens an athletic bag in the trunk of a robber's getaway car. That may be an illegal search according to the *Minjores* case.¹⁷ But is it a substantial violation? How much difference would it make if the officer was a rookie and was unaware of *Minjores* — or if the officer was an eight-year veteran and should have known of *Minjores* but didn't — or if the

officer sense to apply it to cases in which the policeman did not know his conduct was illegal.

Disadvantages: The obvious flaw in this proposal is that it might encourage officers to remain ignorant of correct procedures or, at least, to claim ignorance. It might also encourage police departments to minimize training on legally permissible methods of evidence gathering. The adoption of this test, it is argued, would promptly undue everything the exclusionary rule has attempted to accomplish.

SERIOUS CASE EXCEPTION¹⁸ — In this proposal, illegally obtained evidence would not be excluded in cases involving certain designated serious crimes such as murder, rape, arson and whatever else might be deemed appropriate.

Advantages: It is argued that whether or not a particular police tactic is valid may depend, to some extent, upon the nature of the crime under investigation. For example, a door-to-door search may be justified in attempting to locate a missing child or escaped murderer but would not be permissible in trying to locate a neighborhood marijuana peddler. The serious case exception would impose a sense of proportionality between the crime under investigation and permissible investigative techniques.

Disadvantages: This proposal may encourage police misconduct in the investigation of serious crimes and would do nothing to change the exclusionary rule as far as lesser crimes are concerned.

SANCTIONS AGAINST POLICE¹⁹ — There have been several proposed alternatives to the exclusionary rule which

guaranteed that many officers will become so cautious about making a mistake that they will turn away from difficult situations. Furthermore, such an alternative would require the establishment of an administrative procedure to settle questions of improper conduct and impose sanctions, adding yet another layer of governmental bureaucracy.

POSITIVE INCENTIVES²⁰ — The "positive incentive" alternative to the exclusionary rule would make the exclusionary rule inapplicable to those police departments or officers who could demonstrate that they had made conscientious efforts to learn and follow valid police procedures.

This proposal would require a somewhat more elaborate procedure at the suppression hearing. First, the judge would make a ruling on whether evidence was obtained illegally. If the judge so ruled, he or she would then conduct a hearing to determine whether the department was making a conscientious effort to train its officers in proper police practices and was disciplining offending officers. If this was established, the evidence would then be admitted and the discipline, if any, would be left to the local department.

Advantages: This proposal would encourage both police departments and individual officers to make a serious effort to know and follow the law.

Disadvantages: The hearings required would be extremely time-consuming and would make the plan extremely cumbersome. Also, some evidence could still be excluded.

A similar proposal would reject exclusion of illegally seized evidence if the police department or officer was "certified" as having met certain standards of training, discipline, etc. This would require the setting up of a certification board and standards for certification.²¹ While this proposal also offers positive incentives for training, it does little to insure that certification is followed by lawful conduct. To some, certification might be seen as a license to engage in illegal conduct.

TORT LIABILITY²² — Several proposals involve variations upon a tort liability theme. Basically, they call for the establishment of an administrative or quasi-judicial body which would be set up to hear complaints of police misconduct and, if warranted, order payment of money damages to the victim of the misconduct.²³

Advantages: These proposals are offered as reasonable substitutes for the exclusionary rule. Their implementation would result in the admission rather than the suppression of illegally seized evidence. Also, under such plans, innocent victims of police misconduct, as well as criminal defendants, could file complaints. Advocates point out that the

Officers are usually not even present when a ruling to exclude evidence is made and may not understand what they did wrong if they ever do learn of the ruling.

officer knew about *Minjores* but thought it didn't apply, or just searched anyway? Suppose an appellate court rules that the athletic bag search was improper but was not a substantial violation — does this mean that no evidence from *Minjores*-type searches should be excluded in subsequent cases?

INADVERTENT VIOLATION EXCEPTION²⁴ — Basically, the inadvertent violation exception would not exclude illegally obtained evidence if the violation by the police officer was inadvertent. An inadvertent violation is one which the officer, in all good faith, did not know was illegal at the time it was committed.

Advantages: The argument advanced in support of this proposal is that since one purpose of the exclusionary rule is to deter illegal police conduct, it makes lit-

would impose sanctions directly upon the offending police officer instead of excluding evidence. Among the suggested sanctions are termination, suspension, reduction in rank, forfeiture of pay, fines, change of assignment or mandatory attendance at special training sessions and passage of proficiency tests. Any sanctions imposed would follow an administrative hearing by the police department itself or by an independent agency.

Advantages: Evidence would not be excluded no matter how improperly the officer acted in getting it — with the possible exception of "Rochin"²⁵ type violations which shock the conscience.

Disadvantages: Is it fair to hold an officer personally responsible for not following the law when the law itself is uncertain, complex and confusing? It is ar-

deterrent effect of awarding money damage against an officer will be greater than under the exclusionary rule.

Disadvantages: As in the case of other proposals imposing sanctions directly upon an officer, the danger of such plans is that they will intimidate police officers to such an extent that law enforcement will have little appeal for anyone except

the jurisdictional limits set for the court.

Advantages: First of all, this plan is available to all persons, whereas the present exclusionary rule seems to benefit only criminals. Secondly, any damages awarded to the complaining party would be paid out of the budget of the police department employing the officer. It is expected that the chain of command

A key to any acceptable substitute is the concept of proportionality. Surely the sanctions — whatever they may be — should be commensurate with the violation.

the judgment proof.

Another question raised by these proposals involves the determination of damages. How much should a person be awarded if he can prove that an officer illegally looked under the driver's seat of his car and found a gun — or found nothing? How much should defendant Minjores be awarded as a result of the officer's illegal search of the tote bag in the trunk of the getaway car?

Certainly actual damages should be awarded to the extent they can be proven. But most illegal acts by officers result in no actual damages. Thus, for a tort liability scheme to be effective, a schedule of liquidated damages or punitive damages should be provided in situations where intentional and knowing misconduct can be shown. Also, there must be easy access to the system if it is to effectively compensate aggrieved persons and deter offending officers.

Actual damages, however, should not include legal expenses for the criminal trial or loss of wages during incarceration since such costs are the proximate result of the defendant's criminal conduct and not the result of the fact that illegal means may have been used to detect and convict him.

Of course, present practice allows a traditional civil suit to be filed against a police officer who engages in improper conduct — and against his department. Indeed, the holding of the *Bivens* case was that unreasonable searches and seizures by federal agents give rise to a federal cause of action for damages resulting from the agent's unconstitutional conduct. Similar lawsuits against state and local peace officers have long been provided for under 42 U.S. Code Section 1983.²⁶

CONSTITUTIONAL CLAIMS COURT — One final alternative to the exclusionary rule that deserves serious consideration has been devised by Los Angeles County Deputy District Attorney Ronald Bowers. He calls it the "Constitutional Claims Court." This involves a court proceeding analogous to small claims court in which any person who feels he or she had been the victim of improper police conduct can file a claim and receive a prompt adjudication and payment of money damages subject to

with the police department and the city — serves would be quick to react to prevent future violations by an officer whose conduct had caused them liability. It is very likely that training of all officers would be stepped up. Thirdly, this new procedure would restore public confidence in the courts since criminals would no longer be released as a result of the suppression of evidence and the courts would have shown themselves to be as concerned with the constitutional rights and public safety of honest citizens as they are of criminals.

The availability of the proposed Constitutional Claims Court remedy for improper police conduct would in no way preclude the filing of a traditional civil suit in serious cases, but the new remedy would provide much greater access to the court system than presently exists.

The one saved by avoiding extended Penal Code Section 1535.5 hearings would make available court time to handle such claims. No new agency would have to set up. Police conduct would continue to be supervised by the courts. Police departments would discourage illegal conduct in order to avoid civil damages that would affect their budgets. Yet the individual officer would not be so hamstrung by the fear of personal liability that he could not work effectively.

Conclusion

Which of the proposed alternatives to the exclusionary rule is best? None seems to fit the bill by itself. But from them and other new concepts bound to emerge, it may be possible to draw up a suitable alternative.

I see the following as an outline for a workable alternative:

1. A code of search and seizure law that is simple and straightforward should be established to which every policeman can be held accountable.
2. Should a policeman fail to live up to the black letter standards, the evidence obtained will be excluded only in cases where the evidence was obtained in a manner that shocks the conscience. In other cases, exclusion will not be ordered if there are adequate means of redress in our civil court

structure and adequate disciplinary action available within our police departments.

3. Where a search warrant is obtained and evidence is seized in compliance with the commands of the warrant, evidence should not be excluded unless the warrant was obtained through an intentional misrepresentation.

Is it legally and constitutionally possible to abandon the exclusionary rule? Chief Justice Warren Burger, in *Bivens v. Six Unknown Agents*, says yes. He wrote, in his dissenting opinion, "I see no insuperable obstacle to the elimination of the Suppression Doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials."²⁷ He continued, "Once the constitutional validity of such a statute is established, it can be assumed that the States would develop their own remedial systems on the federal model. Indeed, there is nothing to prevent a State from enacting a comparable statutory scheme without waiting on the Congress."²⁸

Thus, it appears that a properly drawn alternative to the exclusionary rule would pass constitutional muster. Indeed, it may be that several constitutionally valid alternatives can be devised. Different states could try different approaches. As time goes on, it will become clear which approaches work best. This seems preferable to the imposition of a national scheme and hoping for the best.

The failings of the existing exclusionary rule have been amply demonstrated. Yet finding an effective and workable alternative remains a difficult task.

A polarization remains. Many lawyers and citizens view the rule as a safeguard against authoritarianism. Others, thinking of public protection, see the rule as a major barrier to bringing serious criminals to justice. I would opt for greater police powers.

Given our appropriate values for the rule of law, for public protection, and for the truth, and given our concerns against official abuse and overreaching, it seems that both ends of the spectrum might be accommodated through an alternative to the rule which permits the introduction of truthful evidence, yet is also capable of providing proportional sanctions against police misconduct, so that in the long run, constitutional rights are better served. That kind of formulation should serve the needs for those at both ends of the spectrum. With the continued distrust of big government and its institutions, it is in my view the only kind of formulation which will have a chance to get off the ground. □

FOOTNOTES

1. *Weeks v. United States* (1914) 232 U.S. 383, 58 L. ED. 652, 34 S. CT. 341 (Footnotes on page 16)

Exclusionary Rule-Van de Kamp

(Continued from page 11)

2. *Bivens v. Six Unknown Agents* (1971) 403 U.S. 388, 29 L.ED. 2d 619, 91 S.C.T. 1999
3. Wilkey, *The Exclusionary Rule*; 62 JUDICATURE 215 (1978); Kamisar, *Is The Exclusionary Rule An Illogical Or Unnatural Interpretation Of The Fourth Amendment?*, 62 JUDICATURE 66 (1978).
4. Witkin, *The Second Noble Experiment*, PROSECUTOR'S BRIEF, Sept. - Nov. 1977. Deukmejian, *The Bizarre Legal Doctrine*; PROSECUTOR'S BRIEF, July - August 1979
5. *People v. Cohan* (1955) 44 C. 2d 134
6. 44 C. 2d at p. 450
7. 44 C. 2d at pp. 450-451
8. *Mapp v. Ohio* (1961) 367 U.S. 643, 6 L.ED. 2d 1081, 81 S.C.T. 1684
9. 44 C. 2d at p. 451
10. Macklin Fleming, *Of Crimes and Rights*, W.W. Norton & Company, Inc. 1978
11. 44 C. 2d at p. 450, footnote
12. 44 C. 2d at p. 442, footnote
13. *Bivens v. Six Unknown Agents*, 403 U.S. at p. 416, 29 L.ED. 2d at p. 638; Dailin H. Oaks, *Studying The Exclusionary Rule In Search and Seizure*, 37 U. CHI. L. REV. 665 (1970)
14. 44 C. 2d at p. 449
15. Gilligan and Lederer, *Replacing The Exclusionary Rule With Administrative Rule Making*, 28 ALABAMA L. REV. 533, 552 (1977)
16. American Law Institute, *A Model Code Of Pre-arraignment Procedure* SECTION 8.02 (2), (3)
17. *People v. Minjares* (1979) 24 C.3d 410
18. John Kaplan, *The Limits Of The Exclusionary Rule*, 26 STANFORD L. REV. 1027, 1044 (1974)
19. John Kaplan, *The Limits Of The Exclusionary Rule*, 26 STANFORD L. REV. 1046 (1974).
20. Alys Rae Baker and Carol A. Colligan, *Making The Constable Culpable: A Proposal To Improve The Exclusionary Rule*, 27 HASTINGS LAW JOURNAL 1291 (1976)
21. *Rochin v. California* (1952) 342 U.S. 165 - recovery of swallowed drugs by induced vomiting
22. John Kaplan, *The Limits Of The Exclusionary Rule*, 26 STANFORD L. REV. 1027, 1050 (1974)
23. Philip S. Cos, *The ALI Substantiality Test: A Flexible Approach To The Exclusionary Sanction*, 10 GEORGIA L. REV. 1, 49 (1975)
24. Carter LaPrade, *An Alternative To The Exclusionary Rule*, 48 CONN. BAR JOURNAL 100, 107 (1974); William Geller, *Enforcing The Fourth Amendment: The Exclusionary Rule And Its Alternatives*, Jul. 1975 WASH. UNIV. L. QUARTERLY 621, 690-701 (1975); Edward J. Horowitz, *Excluding The Exclusionary Rule - Can There Be An Effective Alternative*, 47 L.A. BAR BUL. 81 (1972); Billy and Rehnberg, *The Fourth Amendment Exclusionary Rule*, 12 THE AMER. CRIM. L. REV. 507, 528 (1975)
25. This is Chief Justice Burger's proposal in *Bivens v. Six Unknown Agents*. See 403 U.S. at p. 423, 29 L.ED. 2d at p. 642
26. 42 U.S. CODE §1983
Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
27. 402 U.S. at p. 421, 29 L.ED. at p. 641
28. 403 U.S. at pp. 423-424, 29 L.ED. at p. 642

TRUTH IN TRIALS

Position Paper
In Support of
Senate Constitutional Amendment 7

By

John K. Van De Kamp
District Attorney of Los Angeles County

- I. THE CALIFORNIA SUPREME COURT, IN PEOPLE V. CAHAN, HOPED TO FASHION WORKABLE RULES GOVERNING SEARCH AND SEIZURE THAT WOULD PROTECT BOTH THE RIGHTS GUARANTEED BY THE CONSTITUTION AND THE INTERESTS OF SOCIETY IN THE SUPPRESSION OF CRIME.

TWENTY-FIVE YEARS AGO, IN PEOPLE V. CAHAN, 44 C. 2d, 454, THE CALIFORNIA SUPREME COURT RULED THAT RELEVANT EVIDENCE OBTAINED BY POLICE PURSUANT TO AN "UNREASONABLE SEARCH AND SEIZURE" WOULD BE SUPPRESSED, THUS EXCLUDED FROM CONSIDERATION IN ALL JUDICIAL PROCEEDINGS. THEY CALLED THIS THE "EXCLUSIONARY RULE." MINDFUL THAT SUPPRESSING RELEVANT EVIDENCE WAS A HIGH PRICE TO PAY FOR PROTECTION FROM "UNREASONABLE SEARCHES AND SEIZURES," THE COURT IN CAHAN REASONED THAT SUCH A REMEDY WAS THE ONLY WAY TO DETER UNREASONABLE POLICE CONDUCT AND UPHOLD THE INTEGRITY OF THE COURTS.

THE CALIFORNIA SUPREME COURT RECOGNIZED, HOWEVER, THAT THE EXCLUSIONARY RULE COULD BECOME "ARBITRARY IN ITS APPLICATION" AND COULD "INTRODUCE NEEDLESS CONFUSION INTO THE LAW OF CRIMINAL PROCEDURE." THE COURT THUS SET AS GOALS THE REJECTION OF ARBITRARY REFINEMENTS AND DISTINCTIONS IN THE RULE AND THE REJECTION OF "NEEDLESS LIMITATIONS ON THE RIGHT OF THE POLICE TO CONDUCT REASONABLE SEARCHES AND SEIZURES." THE EXCLUSIONARY RULE WOULD (IN THE WORDS OF THE CALIFORNIA SUPREME COURT IN CAHAN) "OPEN THE DOOR TO THE DEVELOPMENT OF WORKABLE RULES GOVERNING SEARCHES AND SEIZURES AND THE ISSUANCE OF WARRANTS THAT WILL PROTECT BOTH THE RIGHTS GUARANTEED BY THE CONSTITUTIONAL PROVISIONS AND THE INTERESTS OF SOCIETY IN THE SUPPRESSION OF CRIME."

SINCE CAHAN, THE CALIFORNIA COURTS HAVE EXPLICITLY EXPANDED THE CASES REQUIRING EXCLUSION OF EVIDENCE, THUS EXPLICITLY EXPANDING THE COVERAGE OF THE EXCLUSIONARY RULE BEYOND THE REQUIREMENTS OF THE CONSTITUTION OF THE UNITED STATES. CALIFORNIA COURTS HAVE INCREASINGLY BROADENED THE TECHNICAL REQUIREMENTS DEMANDED OF POLICE OFFICERS, LABELING AS "UNREASONABLE" OR "ILLEGAL" POLICE PRACTICES THAT ELSEWHERE IN THE UNITED STATES AND IN THE FEDERAL COURTS ARE CONSIDERED PERFECTLY

LEGITIMATE AND NECESSARY. THE CALIFORNIA SUPREME COURT HAS ACCOMPLISHED THIS BY IGNORING MANY U.S. SUPREME COURT CASES THAT REFUSE TO EXCLUDE EVIDENCE AGAINST CRIMINAL DEFENDANTS, DECLARING THAT THEIR DECISIONS ARE BASED UPON THE CALIFORNIA CONSTITUTION, NOT THE UNITED STATES CONSTITUTION.

CALIFORNIA'S EXTENSIONS OF THE EXCLUSIONARY RULE BEYOND THE REQUIREMENTS OF THE U.S. CONSTITUTION HAVE FRUSTRATED THE GOALS SET FORTH BY THE COURT IN CAHAN. IT HAS PRODUCED A LABYRINTH OF RULES THAT HAVE ON OCCASION NEEDLESSLY SUPPRESSED THE TRUTH, FREED THE GUILTY, FRUSTRATED VICTIMS AND PUNISHED SOCIETY.

CALIFORNIA'S EXPERIMENT HAS BEEN OF QUESTIONABLE EFFECTIVENESS IN DETERRING UNREASONABLE POLICE CONDUCT. MANY OF ITS APPLICATIONS APPLY TO CONDUCT THAT IS NOT UNREASONABLE. THE RULES GOVERNING SEARCHES AND SEIZURES, ARRESTS AND THE ADMISSIBILITY OF CONFESSIONS HAVE BECOME SO COMPLEX AND CHANGE SO FREQUENTLY THAT NO LAW ENFORCEMENT OFFICER CAN REASONABLY BE EXPECTED TO KNOW THEM IN THEIR ENTIRETY.

CALIFORNIA'S EXCLUSIONARY RULE HAS NOT SERVED THE OTHER PURPOSE STATED IN CAHAN — THE PRESERVATION OF JUDICIAL INTEGRITY. STANFORD LAW PROFESSOR JOHN KAPLAN, CITING THE FACT THAT THE EXCLUSIONARY RULE SUPPRESSES THE MOST RELIABLE AND THE MOST INCRIMINATING EVIDENCE, EVEN WHEN SUCH EVIDENCE WAS GATHERED IN COMPLETE GOOD FAITH AND INVOLVED ONLY MINOR INTRUSIONS INTO ONE'S PRIVACY, HAS CONCLUDED THAT THE EXCLUSIONARY RULE "WOULD SEEM TO INJURE JUDICIAL INTEGRITY FAR MORE THAN IT SERVES THAT END." NOT ONLY ARE MANY OF CALIFORNIA'S RULES EXPANDING DEFENDANTS' RIGHTS UNJUSTIFIED AND UNNECESSARY TO INSURE A FAIR TRIAL, BUT THEY ALSO HAVE BEEN IMPOSED UPON THE PEOPLE BY JUDICIAL FIAT WITHOUT THE BENEFIT OF PUBLIC DEBATE.

BECAUSE MANY OF THE CASES IN CALIFORNIA ARE COINED IN CONSTITUTIONAL TERMS, IT IS NECESSARY TO AMEND THE CALIFORNIA CONSTITUTION IN ORDER TO EFFECTIVELY ADDRESS THE PROBLEM OF CALIFORNIA'S UNREASONABLE APPLICATION OF THE EXCLUSIONARY RULE.¹ IN THAT REGARD THE FOLLOWING AMENDMENT (SCA 7) IS PROPOSED:

ARTICLE 1, SECTION 28

NOTWITHSTANDING ANY OTHER PROVISION OF THIS CONSTITUTION, EVIDENCE SHALL NOT BE EXCLUDED IN ANY CRIMINAL PROCEEDING, INCLUDING PRE-TRIAL AND POST CONVICTION MOTIONS AND HEARINGS, OR IN ANY TRIAL OR HEARING OF A JUVENILE FOR A CRIMINAL OFFENSE, EXCEPT AS PROVIDED BY STATUTE OR AS REQUIRED BY THE UNITED STATES CONSTITUTION.

THE PROPOSED AMENDMENT TO THE CALIFORNIA CONSTITUTION WOULD PROHIBIT CALIFORNIA COURTS FROM EXCLUDING OTHERWISE RELEVANT EVIDENCE OF A DEFENDANT'S GUILT UNLESS EX-

CLUSION OF EVIDENCE IS REQUIRED BY THE UNITED STATES CONSTITUTION OR A CALIFORNIA STATUTE. SPECIFICALLY, THE PROPOSED AMENDMENT WOULD HAVE THE FOLLOWING IMPACT:

1. ALL EXISTING CALIFORNIA RULES THAT DIRECT WHEN EVIDENCE SHALL BE EXCLUDED OR THAT LIMIT THE WAY EVIDENCE MAY BE CONSIDERED SHALL BE CHANGED TO COMPORT WITH THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION OR CALIFORNIA STATUTORY LAW;
2. IN ALL FUTURE CALIFORNIA CASES, CALIFORNIA COURTS MAY ONLY EXCLUDE EVIDENCE OR LIMIT THE WAY THE EVIDENCE IS CONSIDERED TO THE EXTENT SUCH EVIDENCE IS EXCLUDED OR LIMITED BY THE REQUIREMENTS OF THE U.S. CONSTITUTION OR CALIFORNIA STATUTORY LAW;
3. THE PROSECUTION WILL BE ABLE TO SEEK APPEAL OF CALIFORNIA SUPREME COURT DECISIONS EXCLUDING EVIDENCE TO THE UNITED STATES SUPREME COURT. CURRENTLY, WHEN THE CALIFORNIA SUPREME COURT BASES ITS DECISION SOLELY ON INTERPRETATIONS OF THE CALIFORNIA CONSTITUTION, THERE IS, WITH VERY FEW EXCEPTIONS, NO ABILITY TO APPEAL ITS DECISION TO THE UNITED STATES SUPREME COURT;
4. CALIFORNIA'S LEGISLATURE, IN OPEN PUBLIC DEBATES, WILL DETERMINE AFTER EXTENSIVE HEARINGS WHAT, IF ANY, RESTRICTIONS SHOULD BE PLACED UPON THE ADMISSION OF EVIDENCE BEYOND THOSE PROVIDED FOR BY THE UNITED STATES CONSTITUTION.

II. IMPACT OF THE PROPOSED AMENDMENT: CASE EXAMPLES

- A. A CURSORY LOOK AT A FEW CASE EXAMPLES WILL SHOW HOW FAR CALIFORNIA COURTS HAVE STRAYED FROM CAHAN'S ORIGINAL GOALS AND WILL ILLUSTRATE THE FUNDAMENTAL CHANGES THIS AMENDMENT WILL BRING TO CALIFORNIA CRIMINAL LAW.

1. WHAT IS "UNREASONABLE" AND "ILLEGAL" POLICE CONDUCT?

a. CONFESSIONS AND ADMISSIONS

CALIFORNIA HAS DRASTICALLY DEPARTED FROM STANDARDS SET BY THE UNITED STATES SUPREME COURT IN LIMITING THE USE OF A DEFENDANT'S STATEMENTS. CALIFORNIA HAS SPECIAL RULES DEFINING

WHAT CONSTITUTES POLICE QUESTIONING, WHAT CONDITIONS MUST EXIST BEFORE POLICE CAN TALK TO A DEFENDANT, AND WHAT CAN OR CANNOT TAKE PLACE BEFORE A DEFENDANT'S STATEMENTS CAN BE USED IN COURT. IN MANY CASES, CALIFORNIA'S SPECIAL RULES NOT ONLY MEAN THAT A DEFENDANT'S STATEMENTS WILL NOT BE ADMISSIBLE AT TRIAL, BUT ALSO AFFECT THE MANNER IN WHICH POLICE MAY OR MAY NOT GATHER EVIDENCE IN THE FUTURE. FOR EXAMPLE:

- 1) IN PEOPLE V. PETTINGILL, 21 C 3d 231. A BURGLAR WAS IN CUSTODY IN EUREKA. HE REFUSED TO TALK TO THE EUREKA POLICE. BECAUSE EVIDENCE TIED THE DEFENDANT TO BURGLARIES IN SANTA BARBARA, SANTA BARBARA POLICE SOUGHT TO QUESTION HIM. THE SANTA BARBARA POLICE COMPLETELY READ PETTINGILL HIS MIRANDA RIGHTS TO SILENCE AND TO AN ATTORNEY, AND, FREELY AND VOLUNTARILY WAIVING THESE RIGHTS, PETTINGILL CONFESSED TO THE SANTA BARBARA BURGLARIES. THERE WAS NO ATTEMPT TO QUESTION HIM REGARDING WHATEVER CRIMES HE MAY HAVE COMMITTED IN EUREKA.

THE CALIFORNIA SUPREME COURT LABELED THE SANTA BARBARA QUESTIONING AS "ILLEGAL", SUPPRESSED THE CONFESSION AND REVERSED THE CONVICTION. THE CALIFORNIA COURT CHOSE TO COMPLETELY IGNORE THE CONCLUSION OF THE UNITED STATES SUPREME COURT IN MICHIGAN V. MOSLEY, 423 U.S. 96, WHICH HELD IDENTICAL POLICE CONDUCT PROPER AND THE EVIDENCE ADMISSIBLE.

- 2) A MURDERER CONFESSED TO MURDER AND ROBBERY AFTER BEING GIVEN AND WAIVING HIS RIGHTS, BUT HE, TOO, HAD HIS CONFESSION SUPPRESSED. THE REASON: THE TRIAL COURT, WHILE FINDING THE DEFENDANT'S CONFESSION WAS VOLUNTARY, FAILED TO STATE THAT ITS FINDING WAS "BEYOND A REASONABLE DOUBT." AT THE TIME OF TRIAL, THERE WAS NO SUCH REQUIREMENT.

THERE IS STILL NO SUCH REQUIREMENT MANDATED BY THE U.S. CONSTITUTION. PEOPLE V. JIMENEZ, 21 C. 3d 595; LEGO V.

TWOMEY, 404 U.S. 477.

THE RULE OF PEOPLE V. JIMENEZ WAS APPLIED RETROACTIVELY TO ALL CASES THAT WERE NOT YET FINAL ON APPEAL ON THE DATE JIMENEZ WAS DECIDED. HENCE, THE RULE WAS APPLIED IN IN RE ANTHONY J., 86 CA 3d 164, WHERE A JUVENILE CONFESSED TO AND WAS FOUND GUILTY OF TWO COUNTS OF FIRST DEGREE MURDER, NINE COUNTS OF FIRST DEGREE ROBBERY, AND ONE COUNT OF ASSAULT WITH A DEADLY WEAPON. WHILE THE TRIAL COURT FOUND THE JUVENILE'S CONFESSON VOLUNTARY, THE CONVICTION WAS REVERSED BECAUSE THE TRIAL COURT, IN DETERMINING THE ISSUES OF VOLUNTARINESS, FAILED TO APPLY A TEST THAT, AT THE TIME OF TRIAL, DID NOT EXIST.

- 3) IN AN APPELLATE COURT CASE CURRENTLY PENDING BEFORE THE CALIFORNIA SUPREME COURT, A JUVENILE HAD HIS MURDER CONFESSION SUPPRESSED DESPITE THE FACT THAT HE WAS READ, AND WAIVED, HIS CONSTITUTIONAL RIGHTS. THE REASON GIVEN BY THE CALIFORNIA COURT FOR SUPPRESSING THE EVIDENCE WAS BECAUSE THE POLICE FAILED TO TELL THE SUSPECT HE COULD SEE HIS GRANDPARENTS PRIOR TO ANY QUESTIONING. THIS RULING WAS MADE DESPITE THE FACT THAT THE SUSPECT NEVER EVEN ASKED TO SEE HIS GRANDPARENTS. UNDER THE UNITED STATES CONSTITUTION, A DEFENDANT DOES NOT HAVE A RIGHT TO SEE HIS GRANDPARENTS PRIOR TO QUESTIONING BY THE POLICE. IN RE PATRICK W., 104 C.A. 3d 615. (ACCEPTED FOR HEARING BY OUR SUPREME COURT.)

- 4) IN PEOPLE V. RUCKER, A MURDERER HAD HIS STATEMENTS SUPPRESSED AND HIS CONVICTION REVERSED BECAUSE THE STATEMENTS WERE OBTAINED DURING A BOOKING PROCEDURE, I.E., A PROCEDURE WHEREBY JAIL ADMINISTRATORS GATHER STATISTICAL INFORMATION NOT CONCERNING THE CRIME FOR WHICH THE DEFENDANT IS IN JAIL. RUCKER WAS BOASTING DURING THE BOOKING PROCEDURE OF HOW HE COULD BEAT THE CHARGES AGAINST HIM. BOOKING INFORMATION IS NOW CONSIDERED IN CALIFORNIA TO BE POLICE "INTERROGATION"

DESPITE THE FACT THAT THE UNITED STATES SUPREME COURT DEFINES POLICE INTERROGATION AS QUESTIONS THAT ARE REASONABLY LIKELY TO ELICIT AN INCRIMINATING RESPONSE. CERTAINLY IT WOULD BE DIFFICULT TO CLASSIFY RUCKER'S BOOKING PROCEDURE IN THAT CATEGORY. PEOPLE V. RUCKER, 26 C 3d 368; RHODE ISLAND V. INNIS, 64 L Ed. 3d 297, AT 308.

b. SEARCH AND SEIZURE

THE CALIFORNIA SUPREME COURT HAS LABELED "ILLEGAL" OR "UNREASONABLE" POLICE SEARCHES THAT ELSEWHERE ARE PERFECTLY LEGITIMATE. FOR EXAMPLE, THE CALIFORNIA SUPREME COURT IN EXPANDING THE TYPE OF EVIDENCE THAT CAN BE SUPPRESSED, APPLIES DIFFERENT STANDARDS REGARDING WHEN A POLICE OFFICER MAY SEARCH A SUSPECT INCIDENT TO A LAWFUL ARREST, AND WHEN OFFICERS MAY SEARCH A VEHICLE THAT HAS BEEN LAWFULLY IMPOUNDED.

- 1) IN PEOPLE V. TERESINSKI, 26 C. 3d 457, DEFENDANT TERESINSKI ROBBED A STORE. LATER HE WAS STOPPED WHILE IN HIS VEHICLE AND A GUN AND THE STOLEN MONEY WERE DISCOVERED. TERESINSKI WAS PHOTOGRAPHED AND THE VICTIM IDENTIFIED HIM FROM THE PHOTOS, AND LATER IDENTIFIED THE DEFENDANT IN COURT. THE CALIFORNIA SUPREME COURT STATED THAT THE OFFICER MADE A MISTAKE IN STOPPING THE CAR, AND SUPPRESSED THE GUN, THE MONEY AND THE PHOTOGRAPH. THE COURT WENT FURTHER AND PROHIBITED THE ROBBERY VICTIM FROM IDENTIFYING IN COURT TERESINSKI AS THE ROBBER.

THE CALIFORNIA SUPREME COURT HAS THEREFORE SAID THAT A VICTIM'S MEMORY OF A CRIME AND OF THE CRIMINAL CANNOT BE PRESENTED IN COURT, EVEN THOUGH THAT MEMORY WAS OBTAINED BEFORE THE DEFENDANT WAS ARRESTED AND WAS OBTAINED WITHOUT ANY POLICE ACTION AT ALL.

THE UNITED STATES SUPREME COURT DOES NOT ALLOW THE DEFENDANT TO PREVENT HIS VICTIM FROM IDENTIFYING HIM UNDER THESE CIRCUMSTANCES BECAUSE THE VICTIM'S MEMORY OF THE CRIME AND

VICTIM'S MEMORY OF THE DEFENDANT WERE NOT PRODUCED BY ANY ACTION ON THE PART OF THE POLICE. UNITED STATES V. CREWS, 63 L. Ed. 337.

- 2) IN CONTRAST TO THE FEDERAL CASES, THE CALIFORNIA SUPREME COURT HAS MADE IT MORE DIFFICULT FOR POLICE OFFICERS TO BE SECURE WHEN THEY ARE REQUIRED TO TRANSPORT DEFENDANTS. IN GUSTAFSON V. FLORIDA, 414 U.S. 260, AND UNITED STATES V. ROBINSON, 414 U.S. 218, THE COURT HELD THAT THE RIGHT TO SEARCH A DEFENDANT PURSUANT TO A LAWFUL CUSTODIAL ARREST, WHILE BASED UPON THE NEED TO DISARM AND TO DISCOVER EVIDENCE, DOES NOT DEPEND ON WHAT SOME COURT MAY LATER DECIDE WAS THE PROBABILITY, IN A PARTICULAR SITUATION, THAT WEAPONS OR EVIDENCE WOULD IN FACT BE FOUND ON THE SUSPECT. THE COURT HELD THAT THE LAWFUL ARREST ESTABLISHES THE AUTHORITY TO SEARCH, AND IN THE CASE OF A LAWFUL CUSTODIAL ARREST, "A FULL SEARCH OF THE PERSON IS NOT ONLY AN EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT, BUT IS ALSO A REASONABLE SEARCH UNDER THE AMENDMENT."

CALIFORNIA DEPARTS FROM THE RULE OF THE UNITED STATES SUPREME COURT PROTECTING OUR POLICE OFFICERS IN THE FIELD AND IMPOSES MORE LIMITING RULES FOR SEARCHES AND SEIZURES BASED UPON THE CALIFORNIA CONSTITUTION. PEOPLE V. BRISENDINE, 13 C. 3d 528, AND PEOPLE V. NORMAN, 14 C. 3d 929, HOLD THAT IN A TRAFFIC ARREST, WHERE THE DEFENDANT IS TAKEN INTO CUSTODY AND TRANSPORTED IN A POLICE VEHICLE, A MERE PAT-DOWN OF THE SUSPECT FOR WEAPONS IS ALL THAT IS ALLOWED AND OBJECTS IN THE ARRESTEE'S POSSESSION MAY NOT BE SEARCHED UNLESS PROBABLE CAUSE EXISTS THAT WEAPONS MAY BE FOUND THERE.

JUSTICE BURKE'S DISSENT IN BRISENDINE BRINGS HOME THE DANGERS OF THIS CALIFORNIA DECISION. "ROBINSON AND GUSTAFSON MANIFESTLY AFFORD GREATER PROTECTION TO LAW ENFORCEMENT OFFICERS THAN (DOES) THE MAJORITY OPINION." THE JUSTICE POINTED OUT THAT "UNDER ROBINSON AND GUSTAFSON, AN OFFICER MAY MAKE A FULL SEARCH OF A PERSON WHO IS PLACED UNDER CUSTODIAL

ARREST, WHERE AS UNDER . . . THE . . . MAJORITY OPINION AN OFFICER (CANNOT) INVESTIGATE THE CONTENTS OF A CIGARETTE BOX OR BOTTLE THAT IS IN THE POCKET OF SUCH A PERSON UNLESS THE OFFICER IS ABLE TO POINT TO SPECIFIC FACTS THAT SUPPORT A BELIEF THAT THE ARRESTEE IS ARMED WITH AN ATYPICAL WEAPON (E.G., RAZOR BLADES OR ACID) AND OFFICERS UNDOUBTEDLY OFTEN WILL HAVE NO KNOWLEDGE OF FACTS INDICATING ONE WAY OR THE OTHER ON THE SUBJECT. ALSO, ACCORDING TO THE MAJORITY, IF A FULL CUSTODY ARREST HAD BEEN MADE IN CALIFORNIA FOR THE OFFENSE INVOLVED IN ROBINSON, THE OFFICER WOULD HAVE BEEN LIMITED TO A PAT-DOWN PRIOR TO TRANSPORTING THE DEFENDANT IN THE PATROL VEHICLE. A PAT-DOWN, HOWEVER, MIGHT NOT HAVE REVEALED A CAREFULLY CONCEALED WEAPON (E.G., A KNIFE BLADE SECRETED IN A BELT OR UNDER THE ARCH PRESERVER IN A SHOE.)"

- 3) STEVEN SCOTT HAD HIS CONVICTION FOR POSSESSION OF L.S.D. REVERSED BECAUSE THE POLICE "ILLEGALLY" SEIZED THE DRUGS. HIGHWAY PATROL OFFICERS HAD OBSERVED SCOTT AND HIS THREE-YEAR-OLD SON IN THE EARLY HOURS OF THE MORNING STANDING ON A TRAFFIC ISLAND FORMED BY A FREEWAY OFFRAMP. MR. SCOTT APPEARED TO BE INTOXICATED AND COULD FURNISH NO IDENTIFICATION. THE HIGHWAY PATROL OFFICERS DID NOT ARREST THE DEFENDANT; INSTEAD, THEY OFFERED TO TAKE HIM AND HIS SON HOME. BEFORE THE OFFICER COULD LET MR. SCOTT INTO THE POLICE VEHICLE, THEY TOLD HIM HE HAD TO SUBMIT TO A "PAT-DOWN" SEARCH TO MAKE SURE HE DID NOT HAVE ANY WEAPONS ON HIS PERSON. MR. SCOTT DID NOT OBJECT TO THIS; WHEN HE RAISED HIS ARMS, THE ILLEGAL DRUGS WERE EXPOSED AND SEIZED.

THE CALIFORNIA SUPREME COURT FOUND THAT THE PAT-DOWN WAS AN UNREASONABLE INVASION OF PRIVACY IN VIOLATION OF THE CALIFORNIA CONSTITUTION. HAD THE OFFICERS ARRESTED MR. SCOTT FOR PUBLIC INTOXICATION, A PAT-DOWN SEARCH WOULD HAVE BEEN PERMISSIBLE. SINCE THE OFFICERS DID NOT ARREST MR. SCOTT FOR PUBLIC INTOXICATION, THEIR ACTION IN "PATTING-DOWN" MR. SCOTT WAS "ILLEGAL." THIS WAS BECAUSE THE OFFICERS DID NOT FIRST TELL MR. SCOTT THAT HE HAD A RIGHT TO REFUSE THEIR OFFER OF A RIDE, BUT IF HE

ACCEPTED, HE WOULD BE SUBJECT TO A PAT-DOWN SEARCH FOR WEAPONS.

PEOPLE V. SCOTT, 16 C 3d 242, IS JUST ONE MORE EXAMPLE OF HOW CALIFORNIA'S SPECIAL RULES OF SEARCH AND SEIZURE HAVE BECOME ARBITRARY, OVER-TECHNICAL AND HAVE SUPPRESSED VALID EVIDENCE OF GUILT BY APPLICATION OF SOME NEEDLESS LIMITATION ON THE RIGHT TO CONDUCT REASONABLE SEARCHES.

- 4) CALIFORNIA COURTS HAVE SUPPRESSED EVIDENCE RESULTING FROM AN ARREST MADE BY THE POLICE BECAUSE THE COURT LATER FOUND THE STATUTE, WHICH WAS THE BASIS OF THE ARREST, UNCONSTITUTIONAL JENNINGS V. SUPERIOR COURT, 104, C. A. 3d 50.

UNDER THE UNITED STATES CONSTITUTION, THE EVIDENCE AGAINST JENNINGS WOULD NOT HAVE BEEN THROWN OUT; ARRESTING OFFICERS, ACTING IN GOOD FAITH, CAN ENFORCE ORDINANCES AS THEY ARE WRITTEN. WHAT SOME APPELLATE COURT MAY LATER DO TO THAT ORDINANCE IS IRRELEVANT AND DOES NOT MAKE THE POLICE CONDUCT "ILLEGAL." MICHIGAN V. DE FILLIPPO, 443, U.S. 31.

- 5) IN ANOTHER CASE, A RAPIST HAD HIS CONVICTION REVERSED AND WAS SET FREE EVEN THOUGH ALL THE EVIDENCE AGAINST HIM WAS OBTAINED FROM HIS POSSESSION PURSUANT TO A VALID SEARCH WARRANT. WHY WAS HE SET FREE? SOME OF THE INFORMATION USED TO ESTABLISH PROBABLE CAUSE FOR HIS WARRANT CAME FROM A CONSENSUAL SEARCH OF SOMEONE ELSE'S APARTMENT. THE POLICE MET THE OWNER OF THAT APARTMENT WHILE SERVING A SEARCH WARRANT ON STILL ANOTHER NEIGHBORING APARTMENT, AND THE COURT FELT THAT SOME OF THE INFORMATION USED TO OBTAIN THAT SEARCH WARRANT WAS GATHERED IN VIOLATION OF THE RIGHTS OF SOME THIRD PERSON.

THE THIRD PERSON WHOSE RIGHTS WERE SUPPOSEDLY VIOLATED HAD NO INTEREST IN ANY OF THE APARTMENTS SEARCHED OR IN THE DEFENDANT/RAPIST'S RESIDENCE. MOREOVER, THE PERSON WHO ALLEGEDLY VIOLATED THIS THIRD PERSON'S RIGHTS WAS NOT A POLICE OFFICER, AND THE OFFICERS WHO DRAFTED AND SERVED THE SEARCH WARRANTS DID SO IN COMPLETE GOOD FAITH, I.E., THEY HAD NO KNOWLEDGE THAT ANY OF THE THIRD PERSON'S RIGHTS HAD EVER BEEN VIOLATED.

THE RAPIST THUS HAD ALL THE EVIDENCE AGAINST HIM SUPPRESSED EVEN THOUGH NONE OF HIS RIGHTS WERE EVER VIOLATED, ALL THE POLICE WORK WAS DONE IN GOOD FAITH AND IN COMPLETE COMPLIANCE WITH THE LAW, AND DESPITE THE FACT THAT THE ALLEGEDLY DEFECTIVE SEARCH WARRANT YIELDED NO EVIDENCE AGAINST HIM. PEOPLE V. GORDON, ET AL., 84 C.A. 3d 913.

IT IS INCONCEIVABLE NOW FREEING THIS RAPIST IS GOING TO DETER LAW ENFORCEMENT FROM ACTING "ILLEGALLY" OR VINDICATE THE "INTEGRITY" OF OUR COURT SYSTEM.

2. "STATE ACTION" — WHEN DOES THE ACTION OF A CITIZEN BECOME STATE ACTION FOR THE PURPOSE OF THE EXCLUSIONARY RULE?

- a. BECAUSE THE PRIMARY PURPOSE OF THE EXCLUSIONARY RULE IS TO DETER UNREASONABLE POLICE CONDUCT, THE UNITED STATES SUPREME COURT HAS HELD THAT SEARCHES BY PRIVATE INDIVIDUALS ARE NOT THE BASIS FOR SUPPRESSING EVIDENCE. BURDEAU V. MC DOWELL, 256 U.S. 465. BUT CALIFORNIA HAS RECENTLY TAKEN ANOTHER POSITION AND AGAIN DEPARTED FROM ITS PRIOR RULES AND FROM THE CASES HANDED DOWN BY THE UNITED STATES SUPREME COURT. IN PEOPLE V. ZELINSKI, 24, C. 3d 357, A SHOPLIFTER AT ZODY'S WAS OBSERVED PUTTING A BLOUSE IN HER PURSE. SHE LEFT WITHOUT PAYING FOR THE BLOUSE. EMPLOYEES OF ZODY'S THEN STOPPED THE DEFENDANT AND REMOVED THE BLOUSE AND A VIAL, WHICH WAS ON TOP OF THE BLOUSE, FROM HER PURSE. THE EMPLOYEES THEN EXAMINED

THE VIAL, REMOVED A BALLOON FROM THE BOTTLE, EXAMINED THE SUBSTANCE IN THE BALLOON AND THEN WAITED FOR THE POLICE. THE BALLOON CONTAINED HEROIN. THE COURT FOUND THAT THE SEARCH WAS "ILLEGAL" AND, EVEN THOUGH CONDUCTED BY PRIVATE PERSONS, IT EXCLUDED THE EVIDENCE FROM THE SEARCH. HENCE, THE STATE COULD NOT PROSECUTE THE DEFENDANT BECAUSE SOMEONE BEYOND ITS CONTROL TOOK EVIDENCE IN A MANNER THAT CALIFORNIA'S SUPREME COURT FOUND OBJECTIONABLE.

b) TWO CALIFORNIA APPELLATE COURTS HAVE TAKEN THE ZELINSKI'S HOLDING AND APPLIED IT TO OTHER ACTIONS BY PRIVATE CITIZENS. IN IN RE DEBORAH C., 111, CA 3d 289, THE CALIFORNIA SUPREME COURT IS REVIEWING AN APPELLATE COURT'S HOLDING THAT PRIVATE SECURITY GUARDS MUST ADVISE A SHOPLIFTER OF HIS/HER "MIRANDA" RIGHTS.

c) IN ANOTHER CASE, THE CALIFORNIA SUPREME COURT IS REVIEWING AN APPELLATE COURT'S DECISION WHERE A BURGLAR HAD HIS CONVICTION REVERSED BECAUSE THE BURGLARY VICTIM RECOVERED HIS PROPERTY IN AN "ILLEGAL" SEARCH. IN PEOPLE V. NORTH, 111 CA 3d 694, (HEARING GRANTED), THE VICTIMS RETURNED HOME TO FIND THEIR HOME BURGLARIZED. THEY CALLED THE POLICE. AFTER THE POLICE HAD TAKEN FINGERPRINTS AND FILLED OUT THEIR REPORTS, THEY DEPARTED. VICTIM'S DAUGHTER TOLD HER FATHER SHE THOUGHT SHE KNEW WHO HAD COMMITTED THE CRIME. TOGETHER THE TWO WENT TO THE DEFENDANT'S RESIDENCE WHERE THEY SAW HIS CAR. UNABLE TO SEE ANY STOLEN PROPERTY IN THE CAR, AND FEARING THE DEFENDANT WOULD SEE THEM, THE TWO WENT TO THE POLICE STATION.

A POLICEMAN ACCOMPAINED THEM WHEN THEY WENT BACK TO THE DEFENDANT'S CAR. USING THE OFFICER'S FLASHLIGHT, THE VICTIMS SAW SOME OF THEIR STOLEN PROPERTY INSIDE THE CAR. THE OFFICER TOLD THEM THAT HE COULD NOT SEARCH THE

CAR WITHOUT A WARRANT. VICTIM'S DAUGHTER TOLD THE OFFICER THAT THE CAR MIGHT BE STOLEN. THE OFFICER RETURNED TO HIS PATROL VEHICLE TO CHECK ON THE CAR'S OWNERSHIP, LEAVING HIS FLASHLIGHT WITH THE VICTIMS. IN THE OFFICER'S ABSENCE, THE VICTIM ENTERED THE CAR, FOLDED BACK A BLANKET, AND FOUND THE REST OF HIS STOLEN PROPERTY.

THE COURT HELD THAT THE VICTIM'S "SEARCH" WAS "ILLEGAL", THAT THE OFFICER AND THE VICTIMS WERE ENGAGED IN A "JOINT OPERATION" AT THE TIME THE VICTIM ENTERED AND "SEARCHED" THE CAR, AND THAT IN TURNING THE PROPERTY OVER TO THE POLICE FOR USE AS EVIDENCE, THE VICTIM WAS "PROMOTING A STATE INTEREST." ACCORDINGLY, THE EVIDENCE WAS SUPPRESSED. THIS CONCLUSION WAS MANDATED, THE COURT CONCLUDED, TO VINDICATE JUDICIAL INTEGRITY, CONCEEDING THAT ITS HOLDING HAD LITTLE VALUE AS DETERRENCE.

UNDER THE AUTHORITY OF ZELINSKI, THEREFORE, A PRIVATE CITIZEN/VICTIM VIOLATED THE RIGHTS OF THE THIEF WHO HAD JUST BURGLARIZED HIS HOME BY ENTERING THE THIEF'S CAR TO RETRIEVE HIS STOLEN PROPERTY. MOREOVER, THE CONDUCT OF THE VICTIM AND OFFICER IS LABELED A "JOINT OPERATION", AND THUS THE EVIDENCE WAS SUPPRESSED, EVEN THOUGH THE OFFICER HAD NO KNOWLEDGE THAT THE VICTIM WAS GOING TO ENTER THE VEHICLE.

PEOPLE V. ZELINSKI, REPRESENTS A SHARP DEPARTURE FROM THE STANDARDS SET BY THE UNITED STATES SUPREME COURT. SHOULD THE APPELLATE COURT APPLICATIONS OF ZELINSKI BE UPHELD, CALIFORNIA WILL HAVE GONE A LONG WAY IN OBLITERATING ANY DISTINCTION BETWEEN CONDUCT BY THE STATE, AND CONDUCT BY PRIVATE INDIVIDUALS. TO THE EXTENT THAT PRIVATE CITIZENS ARE HELD TO THE SAME STANDARDS AS POLICE, THE NUMBER OF PEOPLE WHO CAN POTENTIALLY "VIOLATE" A CRIMINAL'S "RIGHTS" IS INCREASED, THUS VASTLY EXPANDING THE AMOUNT OF EVIDENCE

THAT WILL BE SUPPRESSED IN THE FUTURE.

NOT ONLY DOES ZELINSKI AND ITS PROGENY FAIL TO DISCOURAGE A CITIZEN FROM RETRIEVING HIS OR HER PROPERTY BY EXCLUDING THE EVIDENCE FROM COURT, BUT IT MAY ACTUALLY DISCOURAGE CITIZENS FROM CALLING THE POLICE AND THUS ENCOURAGE THEM TO TAKE THE LAW INTO THEIR OWN HANDS.

3. "STANDING" -- WHICH DEFENDANTS CAN SEEK TO HAVE EVIDENCE AGAINST THEM SUPPRESSED BECAUSE OF AN ALLEGED "UNREASONABLE" SEARCH AND SEIZURE?

"EACH TIME THE EXCLUSIONARY RULE IS APPLIED IT EXACTS A SUBSTANTIAL SOCIAL COST FOR THE VINDICATION OF FOURTH AMENDMENT RIGHTS. RELEVANT AND RELIABLE EVIDENCE IS KEPT FROM THE TRIER OF FACT AND THE SEARCH FOR THE TRUTH AT TRIAL IS DEFLECTED". RAKAS V. ILLINOIS, 58 L Ed. 2d 387, at 397. BECAUSE OF THIS SOCIAL COST, THE UNITED STATES SUPREME COURT HAS LIMITED THE APPLICABILITY OF THE RULE TO DEFENDANTS WHOSE PERSONAL "LEGITIMATE EXPECTATION OF PRIVACY" HAS BEEN UNREASONABLY VIOLATED. ONLY BY LIMITING APPLICATION OF THE EXCLUSIONARY RULE IN THIS MANNER WILL IT BE PREVENTED FROM BECOMING A "WINDFALL TO CRIMINAL DEFENDANTS WHOSE FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED." U.S. V. SALVUCCI, 65 L Ed 2d 619, AT 630.

CALIFORNIA HAS NO SUCH LIMITATIONS, AND ALLOWS A CRIMINAL DEFENDANT TO CLAIM THAT HIS CONFESSION, OR EVIDENCE AGAINST HIM, SHOULD BE SUPPRESSED EVEN THOUGH NONE OF HIS RIGHTS WERE EVER VIOLATED. FOR EXAMPLE, A DRUG DEALER IN CALIFORNIA HAD HIS CONVICTION REVERSED BECAUSE EVIDENCE AGAINST HIM WAS OBTAINED IN AN "ILLEGAL" PAT-DOWN (SEARCH FOR WEAPONS) OF SOME OTHER PERSON. PEOPLE V. MARTIN, 45 C 2d 755, KAPLAN V. SUPERIOR COURT, 6 C 3d 150.

A CALIFORNIA COURT HAS GONE SO FAR AS TO HOLD THAT A THIEF CAN

CHALLENGE EVIDENCE USED AGAINST HIM BY ASSERTING THAT A SEARCH VIOLATED THE RIGHTS OF HIS VICTIM. FOR EXAMPLE, ASSUME A CAR THIEF STEALS A CAR AND IS LATER APPREHENDED. IF THE POLICE IN CATCHING THE THIEF, VIOLATE ONE OF CALIFORNIA'S TECHNICAL RULES REGARDING AUTOMOBILE SEARCHES, THEY ARE "VIOLATING" THE "RIGHTS" OF THE VICTIM/OWNER OF THE VEHICLE. THE THIEF CAN THUS CLAIM HIS VICTIM'S RIGHTS AND HAVE THE EVIDENCE OF THE THEFT SUPPRESSED. PEOPLE V. HACKETT, 115 CA 3d 592.

HAD THE CALIFORNIA DRUG DEALER BEEN ACCORDED ONLY THE RIGHTS GUARANTEED TO CRIMINAL DEFENDANTS BY THE BILL OF RIGHTS, THE SUPPRESSED EVIDENCE WOULD HAVE BEEN ADMISSIBLE. FOR EXAMPLE, DEFENDANT RAKAS WAS CONVICTED OF ARMED ROBBERY. HE WAS A PASSANGER IN A CAR THAT WAS STOPPED BY POLICE SHORTLY AFTER A ROBBERY HAD TAKEN PLACE. THE POLICE STOPPED THE CAR BECAUSE THEY FELT IT MATCHED THE DESCRIPTION OF THE GETAWAY CAR USED IN THE CRIME. A SEARCH OF THE CAR REVEALED A RIFLE AND SOME SHELLS. RAKAS CONTENTED THE SEARCH OF THE CAR VIOLATED FOURTH AMENDMENT RULES REGARDING SEARCHES OF AUTOMOBILES AND SOUGHT TO HAVE THE EVIDENCE SUPPRESSED. HOWEVER, BECAUSE HE DID NOT OWN THE PLACE SEARCHED (THE CAR) NOR ADMIT TO OWNING THE ITEMS SEIZED (THE RIFLE AND THE SHELLS), THE SEARCH DID NOT INVADE ANY PLACE WHERE HE HAD A LEGITIMATE EXPECTATION OF PRIVACY. IN SHORT, HE HAD NONE OF HIS RIGHTS VIOLATED. THE EVIDENCE WAS THEREFORE NOT SUPPRESSED AND HIS CONVICTION WAS AFFIRMED BY THE UNITED STATES SUPREME COURT.

THE UNITED STATES SUPREME COURT, IN ALDERMAN V. U.S., 394 U.S. 165, PUT THE EXCLUSIONARY RULE IN SOME PERSPECTIVE WHEN THEY CONCLUDED:

"THE DETERRENT VALUES OF PREVENTING THE INCRIMINATION OF THOSE WHOSE RIGHTS THE POLICE HAVE VIOLATED HAVE BEEN CONSIDERED SUFFICIENT TO JUSTIFY THE SUPPRESSION OF PROBATIVE EVIDENCE EVEN THOUGH THE CASE AGAINST THE DEFENDANT IS WEAKENED OR DESTROYED. WE ADHERE TO THAT JUDGMENT. BUT WE ARE NOT CONVINCED THAT THE ADDITIONAL BENEFITS OF EXTENDING THE EXCLUSIONARY RULE TO OTHER

DEFENDANTS WOULD JUSTIFY FURTHER ENCROACHMENT UPON THE PUBLIC INTEREST IN PROSECUTING THOSE ACCUSED OF CRIMES AND HAVING THEM ACQUITTED OR CONVICTED ON THE BASIS OF ALL THE EVIDENCE WHICH EXPOSES THE TRUTH," 394 US, AT 174-175, 22 L Ed 2d 176, 89 S. Ct 961.

CALIFORNIA HAS REJECTED THIS PLEA AGAINST FURTHER ENCROACHMENT UPON THE PUBLIC INTEREST AND HAS CREATED THE VERY WINDFALL FOR CRIMINAL DEFENDANTS, WHOSE FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED, THAT THE UNITED STATES SUPREME COURT, IN INTERPRETING THE UNITED STATES CONSTITUTION, HAS SOUGHT TO AVOID.

BY FAILING TO LIMIT ACCESS TO THE EXCLUSIONARY RULE TO ONLY THOSE DEFENDANTS WHOSE RIGHTS HAVE BEEN VIOLATED, THE IMPACT OF CALIFORNIA'S PROVINCIAL RULES AS TO WHAT POLICE CONDUCT IS "ILLEGAL" IS COMPOUNDED MANY TIMES.

4. "IMPEACHMENT" - IN CALIFORNIA, ONCE EVIDENCE IS SUPPRESSED, A DEFENDANT CANNOT BE CONFRONTED WITH IT WHILE TESTIFYING, EVEN IF IT MEANS THE DEFENDANT CAN THUS COMMIT PERJURY.

THE SIGNIFICANCE OF CALIFORNIA'S EXPANSION OF THE EXCLUSIONARY RULE IS FURTHER ILLUSTRATED BY THE FACT THAT EVIDENCE WILL BE EXCLUDED EVEN THOUGH ITS EXCLUSION ALLOWS THE DEFENDANT TO FREELY COMMIT PERJURY. SIMPLY STATED, ONCE CALIFORNIA COURTS SUPPRESS EVIDENCE, A DEFENDANT CAN TESTIFY, SECURE IN THE KNOWLEDGE THAT HE WILL NEVER BE CONFRONTED OR IMPEACHED WITH THIS EVIDENCE. THIS IS MANIFESTLY INCONSISTENT WITH OUR CONSTITUTIONAL RIGHTS AS DEFINED BY THE UNITED STATES SUPREME COURT.

IN ALLOWING A DEFENDANT'S STATEMENTS TO BE USED AGAINST HIM, THE UNITED STATES SUPREME COURT STATED: "THE SHIELD PROVIDED BY MIRANDA CANNOT BE PERVERTED INTO A LICENSE TO USE PERJURY BY WAY OF A DEFENSE, FREE FROM THE RISK OF CONFRONTATION WITH PRIOR INCONSISTENT UTTERANCES." HARRIS V. NEW YORK. THE

PROSECUTION SHOULD BE ALLOWED TRADITIONAL TRUTH-TESTING DEVICES ON CROSS-EXAMINATION. IN ALLOWING ITEMS OF "ILLEGALLY OBTAINED" PHYSICAL EVIDENCE TO BE USED TO IMPEACH A DEFENDANT'S TESTIMONY, THE U.S. SUPREME COURT CONCLUDED: "THERE IS NO GAINSAIDING THAT ARRIVING AT THE TRUTH IS A FUNDAMENTAL GOAL OF OUR LEGAL SYSTEM . . . THE DEFENDANT'S OBLIGATION TO TESTIFY TRUTHFULLY IS FULLY BINDING ON HIM WHEN HE IS CROSS-EXAMINED." UNITED STATES V. HAVENS, 48 L.W. 4596 (MAY 27, 1980).

IN CALIFORNIA, HOWEVER, WHERE A CONFESSION HAS BEEN SUPPRESSED, THE DEFENDANT CAN TESTIFY THAT HE HAS ALWAYS PROCLAIMED HIS INNOCENCE, KNOWING THAT HE CANNOT BE CONFRONTED BY HIS PRIOR CONFESSION. FURTHER, A DEFENDANT WHO HAS HAD ITEMS OF PHYSICAL EVIDENCE SUPPRESSED CAN TESTIFY THAT HE HAS NEVER SEEN THESE ITEMS, SECURE IN THE KNOWLEDGE THAT THE PROSECUTOR CANNOT CONFRONT HIM WITH THE FACT THAT THESE ITEMS MAY HAVE BEEN FOUND ON HIS PERSON OR IN HIS POSSESSION.

HENCE, IN PEOPLE V. DISBROW, 16 C. 3d 101; A DEFENDANT HAD HIS MURDER CONVICTION REVERSED BECAUSE HE WAS CONFRONTED BY HIS PRETRIAL STATEMENTS THAT SHOWED HIS TESTIMONY IN COURT WAS A LIE. IF THE PROPOSED AMENDMENT IS ENACTED, THIS LICENSE FOR PERJURY WOULD BE REVOKED, AND THE RULES GOVERNING THE USE OF SUPPRESSED EVIDENCE MADE TO CONFORM WITH THOSE ANNOUNCED BY THE UNITED STATES SUPREME COURT.

III. WHEN DO SIMILAR CONSTITUTIONAL PROVISIONS HAVE VASTLY DIFFERENT MEANINGS, AND WHEN DO THEY MEAN THE SAME THING?

WITH RESPECT TO THE BASIC FUNDAMENTAL CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES AND SELF-INCRIMINATION, PROVISIONS IN THE CALIFORNIA CONSTITUTION ARE NEARLY IDENTICAL WITH THE PROVISIONS IN THE UNITED STATES CONSTITUTION. FOR EXAMPLE, ARTICLE 1, SECTION 13 OF THE CALIFORNIA CONSTITUTION PROVIDES: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS AGAINST UNREASONABLE SEIZURES AND SEARCHES MAY NOT BE VIOLATED, AND A WARRANT MAY NOT BE ISSUED EXCEPT ON PROBABLE CAUSE, SUPPORTED

BY OATH OR AFFIRMATION, PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSONS AND THINGS TO BE SEIZED. THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES: "THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL BE ISSUED, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSON OR THING TO BE SEIZED."

ARTICLE I, SECTION 15, OF THE CALIFORNIA CONSTITUTION READS IN PERTINENT PART: "PERSONS MAY NOT . . . BE COMPELLED IN A CRIMINAL CAUSE TO BE A WITNESS AGAINST THEMSELVES . . ." THE ANALOGOUS PROVISION OF THE FEDERAL CONSTITUTION IS FOUND IN THE FIFTH AMENDMENT, WHICH READS IN PERTINENT PART: "NO PERSON . . . SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF . . ."

DESPITE THE NEARLY IDENTICAL LANGUAGE, WHEN THE CALIFORNIA SUPREME COURT DEPARTS FROM CLEAR FEDERAL PRECEDENT IT GIVES THESE IDENTICAL WORDS VASTLY DIFFERENT MEANING. FOR EXAMPLE, BY CITING ARTICLE I, SECTION 15, INSTEAD OF ITS COUNTERPART IN THE BILL OF RIGHTS, AS MANDATING SUPPRESSION IN CASES LIKE ZELINSKI, BRISENDINE, NORMAN, AND DISBROW, IT IS GIVING THE TERM "UNREASONABLE SEARCHES AND SEIZURES" NEW AND BROAD MEANING. ALSO, THE CALIFORNIA COURT HAS GIVEN VASTLY DIFFERENT MEANING TO THE TERM "PROBABLE CAUSE" THAN FOUND IN THE FEDERAL SYSTEM. PEOPLE V. MILLER, 7 Cal 3d 219, SCOTT V. U.S., 436, U.S. 128. BY RELYING ON ARTICLE 1, SECTION 15 IN PEOPLE V. RUCKER, THE CONCEPT OF "CUSTODIAL INTERROGATION" HAS A WHOLLY DIFFERENT MEANING IN A STATE COURT THAN IT WOULD IN A FEDERAL COURT LOCATED IN THE SAME CITY.

THIS LACK OF UNIFORMITY DOES LITTLE TO FOSTER RESPECT FOR THE RULE OF LAW. AS ONE COMMENTATOR NOTED: "IN AN AGE OF EVERINCREASING TECHNOLOGY AND MOBILITY, THE AMERICAN PEOPLE MAY FIND IT 'CURIOUSER AND CURIOUSER' THAT CONCEPTIONS OF THEIR FUNDAMENTAL RIGHTS SHOULD CHANGE DRAMATICALLY WHEN THEY MERELY CROSS A STATE LINE".²

INDEED, WHEN THE UNITED STATES SUPREME COURT DECIDED U.S. V. ROBINSON, AND GUSTAFSON V. FLORIDA, THE STATE OF OREGON ABANDONED ITS EARLIER APPROACH TO SEARCHES INCIDENT TO A CUSTODIAL ARREST AND ADOPTED THE RULE OF ROBINSON. IN SO DOING, THE OREGON COURT CONCLUDED THAT . . . "(T)HE LAW OF SEARCH AND SEIZURE IS BADLY IN NEED OF SIMPLIFICATION . . . NOT ADOPTING THE RULE OF ROBINSON WOULD

ADD FURTHER CONFUSION IN THAT THERE WOULD BE AN 'OREGON RULE' AND A 'FEDERAL RULE'" STATE V. FLORENCE, 270, OR 169 (1974).

THE CALIFORNIA COURT SEEMS OBLIVIOUS TO THE NEED FOR UNIFORMITY OF MEANING TO CORRESPOND TO THE UNIFORMITY OF CONSTITUTIONAL PROVISIONS THAT WAS EASILY RECOGNIZED BY THE OREGON SUPREME COURT.

CALIFORNIA'S PENCHANT FOR DEVIATING FROM FEDERAL PRECEDENT BY RELYING ON ANALOGOUS PROVISIONS OF THE CALIFORNIA CONSTITUTION HAS CREATED OTHER SERIOUS PROBLEMS.

NO SET OF GUIDELINES OR PRINCIPLES ARE EVIDENT TO AID LAWYERS AND LAYMEN IN PREDICTING WHEN THE CALIFORNIA COURT WILL FOLLOW FEDERAL PRECEDENT AND WHEN IT WILL NOT. HOW ARE POLICE, PROSECUTORS, JUDGES, AND CITIZENS TO BE ADVISED WITH RESPECT TO WHAT RULES WILL APPLY TO ANY GIVEN CONDUCT IF TWO BODIES OF LAW EXIST FOR IDENTICAL CONSTITUTIONAL LANGUAGE, UNLESS THERE IS A CALIFORNIA SUPREME COURT CASE DIRECTLY ON POINT?

TO ILLUSTRATE THIS PROBLEM, CONSIDER PEOPLE V. PETTINGILL. TO JUSTIFY DEPARTURE FROM MICHIGAN V. MOSLEY, THE CALIFORNIA COURT SAID IT WAS RELYING ON LANGUAGE IN THE CALIFORNIA CONSTITUTION. THERE WERE NO CONDITIONS, PARTICULAR TO CALIFORNIA, CITED TO SUPPORT A DIFFERENT MEANING, NOR WAS THERE ANY ATTEMPT TO SHOW THAT STATE CONSTITUTIONAL HISTORY INTENDED TO CONFER GREATER PROTECTIONS TO CRIMINAL DEFENDANTS, IN THE AREA OF SELF-INCRIMINATION, THAN WAS AFFORDED BY THE FEDERAL CONSTITUTION.

SIMILARLY, IN PEOPLE V. JIMENEZ, THERE WERE NO CONDITIONS PECULIAR TO CALIFORNIA MENTIONED TO EXPLAIN DEVIATION FROM THE FEDERAL RULE IN LEGO V. TWOMEY.

WHEN THE COURT DECIDED PEOPLE V. BRAESEKE, 25 C 3d 691, THEY APPEARED TO BE DEALING WITH ISSUES ANALOGOUS TO PETTINGILL AND JIMENEZ. IN BRAESEKE, THE DEFENDANT MURDERED HIS MOTHER, FATHER, AND GRANDFATHER AND FREELY CONFESSED TO THESE CRIMES. AFTER THE TRIAL, HE AGAIN CONFESSED, THIS TIME ON A NATIONALLY TELEVIEWED SEGMENT OF CBS' "60 MINUTES." THERE SHOULD BE NO DOUBT THAT THIS MURDERER DISCUSSED THESE CRIMES FREELY, AND VOLUNTARILY WAIVED HIS RIGHTS. HIS CONVICTION WAS REVERSED BY THE CALIFORNIA SUPREME COURT.

A MAJORITY OF FOUR SUPREME COURT JUSTICES STATED THAT BECAUSE BRAESEKE HAD, AT

ONE POINT, ASKED FOR THE QUESTIONING TO STOP, ALL SUBSEQUENT CONFESSIONS AND ITEMS OF PHYSICAL EVIDENCE HAD TO BE SUPPRESSED. THEY REACHED THIS CONCLUSION DESPITE THE FACT THAT BRAESEKE'S REQUEST TO STOP THE QUESTIONING WAS COMPLETELY HONORED AND THAT POLICE QUESTIONING WAS RESUMED ONLY AFTER BRAESEKE INITIATED IT BY FREELY AND VOLUNTARILY TELLING THE POLICE THAT HE DESIRED TO MAKE A STATEMENT.

IN HOLDING THAT THE RE-INITIATION OF INTERROGATION WAS SIMILAR TO THAT THEY HAD CONDEMNED IN PETTINGILL, THE COURT CONCLUDED, CITING JIMENEZ, THAT THERE WAS NO EVIDENCE FROM WHICH THE TRIAL COURT COULD HAVE FOUND, BEYOND A REASONABLE DOUBT, THAT BRAESEKE'S CONFESSION WAS A PRODUCT OF A KNOWING AND INTELLIGENT WAIVER OF HIS RIGHTS.

WHILE THE COURT FAILED TO DIRECTLY STATE THAT IT WAS BASING ITS DECISION ON CALIFORNIA LAW, RELYING ON PETTINGILL AND JIMENEZ (CALIFORNIA CASES) WOULD SEEM TO INDICATE THAT IT WAS.

YET WHEN QUERIED BY THE UNITED STATES SUPREME COURT AS TO WHETHER THE DECISION WAS BASED UPON STATE OR FEDERAL CONSTITUTIONAL LAW, (CALIFORNIA V. BRAESEKE, 62 L Ed 2d 720) THE CALIFORNIA COURT INDICATED THAT THE BASIS FOR ITS DECISION WAS FEDERAL LAW.

ANOTHER EXAMPLE SHOWING THE DIFFICULTY IN PREDICTING WHEN CONDUCT WILL BE GIVEN FEDERAL MEANING AND WHEN IT WILL NOT CAN BE SEEN IN IN RE MICHAEL C., 21 C 3d 471.

IN IN RE MICHAEL C., A JUVENILE HAD HIS CONFESSION TO MURDER AND ROBBERY SUPPRESSED BY THE CALIFORNIA SUPREME COURT DESPITE THE FACT HE WAS READ HIS RIGHTS AND WAIVED THEM IN ACCORDANCE WITH ACCEPTED UNITED STATES SUPREME COURT STANDARDS. THE REASON: THE JUVENILE HAD ASKED TO SEE HIS PROBATION OFFICER DURING THE QUESTIONING.

THE UNITED STATES SUPREME COURT REVERSED THIS CASE AND CONCLUDED THAT A DEFENDANT HAS A RIGHT TO AN ATTORNEY BEFORE QUESTIONING BY POLICE BUT DOES NOT PER SE HAVE THE RIGHT TO A PROBATION OFFICER.

RATHER THAN AFFIRMING ITS DECISION ON STATE CONSTITUTIONAL GROUNDS, THE CALIFORNIA SUPREME COURT LET THE UNITED STATES SUPREME COURT DECISION STAND.

THE CALIFORNIA COURT RESORTS TO THE CALIFORNIA CONSTITUTION TO JUSTIFY DEPARTURES FROM UNITED STATES SUPREME COURT DECISIONS ON SOME OCCASIONS, AND NOT ON OTHERS, AND DOES NOT ACT PURSUANT TO ANY RECOGNIZABLE OR ACCEPTABLE GUIDELINES SO THAT THESE DEPARTURES CAN BE PREDICTED IN ADVANCE. THIS CALLS INTO QUESTION THE MOTIVE FOR THEIR LIBERAL RELIANCE ON THE CALIFORNIA CONSTITUTION.

SO LONG AS CALIFORNIA'S COURT RELIES ON THE CALIFORNIA CONSTITUTION WHEN IT DEVIATES FROM FEDERAL PRECEDENT, AND GIVES A DEFENDANT MORE RIGHTS THAN REQUIRED BY THE UNITED STATES SUPREME COURT, THE UNITED STATES SUPREME COURT CANNOT REVIEW CALIFORNIA'S DECISIONS. THIS IS ALSO TRUE WHEN CALIFORNIA RESTS ITS DECISIONS ON BOTH STATE AND FEDERAL GROUNDS. THE NET EFFECT OF CALIFORNIA'S FREQUENT RELIANCE ON THE CALIFORNIA CONSTITUTION IS TO INSULATE ITS DECISIONS FROM ANY FEDERAL REVIEW. BECAUSE THESE DECISIONS ARE CONSTITUTIONAL IN SCOPE, THEY ARE ALSO BEYOND REACH OF STATUTORY MODIFICATION. SUCH A DELIBERATE TACT TAKEN BY THE CALIFORNIA SUPREME COURT TO INSULATE ITSELF FROM REVIEW IS A QUESTIONABLE USE OF JUDICIAL POWER AND HARMS THE PERCEPTION OF THE INTELLECTUAL INTEGRITY OF THE COURT.

UNDER SENATE CONSTITUTIONAL AMENDMENT 7, THE DESIRED UNIFORMITY AND PREDICTABILITY WOULD BE ACHIEVED, AND THE COURT COULD NOT SUPPRESS EVIDENCE, AND THEREAFTER INSULATE ITSELF FROM ANY REVIEW OR FROM THE REQUIREMENTS OF THE BILL OF RIGHTS.

IV. S.C.A. 7 REAFFIRMS CALIFORNIA'S INDEPENDENT STATE GROUNDS POWERS AND DOES NOT DIMINISH ITS RIGHTS IN RELATIONSHIP TO THE FEDERAL GOVERNMENT.

THIS MEASURE DOES NOT RESTRICT THE "STATE'S RIGHTS" OF CALIFORNIA, NOR DOES IT DIMINISH THE POWER OF CALIFORNIA IN THE FEDERAL-STATE RELATIONSHIP.

BECAUSE CALIFORNIA CANNOT UNILATERALLY MODIFY OR ABOLISH THE EXCLUSIONARY RULE AS APPLIED TO CALIFORNIA BY THE UNITED STATES SUPREME COURT, SUCH RULES ARE NOT ALTERED BY SENATE CONSTITUTIONAL AMENDMENT 7.

WHAT S.C.A. 7 DOES DO IS ADDRESS THE PURELY INTRA-STATE ISSUE OF WHAT BODY WITHIN CALIFORNIA SHALL EXERCISE OUR STATE'S EXISTING INDEPENDENT POWER TO FURTHER EXCLUDE EVIDENCE BEYOND THE REQUIREMENTS OF THE UNITED STATES

CONSTITUTION. THIS MEASURE SHIFTS THE POWER TO MAKE THAT DECISION FROM THE CALIFORNIA SUPREME COURT TO OUR LEGISLATURE.

CLEARLY, THIS PURELY INTRA-STATE SHIFT OF DECISION-MAKING POWER DOES NOT ALTER CALIFORNIA'S FEDERAL-STATE RELATIONSHIP, NOR DOES THE SHIFT IMPAIR CALIFORNIA'S ABILITY TO EXPERIMENT IN THE MANNER ENVISIONED BY OUR FOREFATHERS WHO SET UP THE FEDERAL SYSTEM. ARGUABLY, BECAUSE SCA 7 DOES PLACE THE POWER TO EXERCISE CALIFORNIA'S STATE'S RIGHTS POWER IN A BODY MORE OPEN AND MORE RESPONSIBLE TO THE PEOPLE, NEW VIABILITY WILL THEREBY BE BREATHED INTO OUR STATE'S ABILITY TO EXERCISE ITS INDEPENDENT STATE GROUNDS POWER AND NEW VIGOR WILL THEN BE ADDED TO THE CONCEPT OF FEDERALISM AS PRACTICED BY CALIFORNIA.

BECAUSE SCA 7 PREVENTS OUR COURTS FROM EXCLUDING EVIDENCE EXCEPT AS PROVIDED BY THE UNITED STATES CONSTITUTION OR STATE STATUTE, OUR COURTS WILL REMAIN FREE TO INTERPRET THE UNITED STATES CONSTITUTION, REGARDLESS OF WHETHER THE UNITED STATES SUPREME COURT HAS OR HAS NOT ADDRESSED THE ISSUE AT HAND. ONCE OUR COURT

HAS MADE ITS INTERPRETATION OF THE UNITED STATES CONSTITUTION, THE PARTIES MAY SEEK AN APPEAL TO THE UNITED STATES SUPREME COURT WHICH, OF COURSE, IS THE FINAL ARBITER OF THE MEANING OF THE UNITED STATES CONSTITUTION. CERTAINLY, THE MERE ABSENCE OF A DECISION ON AN ISSUE BY THE UNITED STATES SUPREME COURT IN NO WAY PREVENTS OUR COURT FROM RULING ON THE MATTER NOR DOES IT LEAVE A GRAY AREA THAT CANNOT BE ADDRESSED.

V. THE ADVERSE EFFECTS OF THE CALIFORNIA SUPREME COURT'S EXCLUSIONARY RULE DECISIONS, ALTHOUGH DIFFICULT TO QUANTIFY, ARE REAL AND AFFECT THE ADMINISTRATION OF JUSTICE IN WAYS THAT ARE NOT EASILY SUBJECT TO STATISTIFICATION

AS LOS ANGELES COUNTY SHERIFF PETER J. PITCHESS SAID IN VOICING HIS STRONG SUPPORT FOR S.C.A. 7, "THE DOCTRINE OF INDEPENDENT STATE GROUNDS, SPECIFICALLY IN THE AREA OF THE EXCLUSIONARY RULE, HAS SERIOUSLY IMPAIRED EFFECTIVE LAW ENFORCEMENT IN THIS STATE. ADVERSE STATE COURT DECISIONS HAVE FREED KNOWN CRIMINALS WHOSE GUILT COULD BE READILY PROVED WITH THE EVIDENCE AT HAND SIMPLY

BECAUSE THE PEACE OFFICER WHO OBTAINED THE EVIDENCE VIOLATED A MINOR TECHNICALITY. GUILT OR PROTECTION OF SOCIETY IS NOT CONSIDERED BY THE STATE

COURTS WHEN CONSIDERING ISSUES OF SEARCH AND SEIZURE."

ALTHOUGH, AS SHERIFF PITCHESS HAS POINTED OUT, "ADVERSE STATE COURT DECISIONS HAVE FREED KNOWN CRIMINALS WHOSE GUILT COULD BE READILY PROVEN WITH THE EVIDENCE AT HAND . . ." THERE IS A DEARTH OF STATISTICAL STUDIES EXAMINING SUCH A PROPOSITION.

CLEARLY, PART OF THE PROBLEM IN ATTEMPTING TO QUANTIFY THIS AREA OF THE LAW IS THAT ITS EFFECT ON THE PRIMARY TARGET — THE LINE LAW ENFORCEMENT OFFICER — IS A VERY DIFFICULT PART OF THE SYSTEM TO MEASURE. THE NUMBER OF CRIMINAL ACTS OBSERVED BY THE POLICE, YET OVERLOOKED BECAUSE OF CASE DECISIONS FORBIDDING INVESTIGATION, DETENTION, OR ARREST BASED UPON SUCH CONDUCT, IS NOT AVAILABLE BECAUSE SUCH OBSERVATIONS ARE NOT REPORTED AND CANNOT BE REPORTED IN ANY MEANINGFUL WAY. THEREFORE, IT IS NECESSARY TO LOOK AT THE FEW STUDIES THAT HAVE BEEN CONDUCTED WHICH NECESSARILY TOUCH UPON THE QUESTION ONCE A CASE HAS BEEN BROUGHT TO THE PROSECUTION BY A POLICE AGENCY.

IN LOOKING AT THE PERCENTAGE OF CRIMINAL CASES REJECTED AT THE INITIAL SCREENING STAGE, ONE STUDY, "A CROSS CITY COMPARISON OF FELONY CASE PROCESSING," (L.A. CO.) INSLAW, APRIL, 1979, CONCLUDED THAT 4% OF FELONY ARRESTS SUBMITTED FOR PROSECUTION WERE REJECTED ON SEARCH AND SEIZURE GROUNDS. ANOTHER STUDY FROM THE STATE BUREAU OF CRIMINAL STATISTICS INDICATES THAT IN 1979, 5.17% OF ALL FELONY CASES REJECTED WERE REJECTED ON SEARCH AND SEIZURE GROUNDS. BASED UPON THAT STUDY, THIS MEANS THAT IN LOS ANGELES COUNTY OVER 1000 FELONS HAD THEIR CASES REJECTED, NOT BECAUSE THE EVIDENCE WAS INSUFFICIENT, BUT BECAUSE RELIABLE, PROBATIVE EVIDENCE WAS CONSIDERED INADMISSIBLE.

IT CAN PERSUASIVELY BE ARGUED THAT THE INSLAW FIGURES ARE LOW. THESE FIGURES WERE FOR THE FIRST HALF OF 1977 AND SINCE THAT DATE THE LAWS OF SEARCH AND SEIZURE AS ENUNCIATED BY DECISIONS OF THE CALIFORNIA SUPREME COURT HAVE BECOME EVEN MORE FAR-REACHING — TOUCHING MORE FACTUAL SITUATIONS THAT WILL BE PRESENTED TO A PROSECUTOR FOR A FILING DECISION. FURTHER, IT SHOULD BE NOTED THAT INSLAW'S 4% FIGURE WAS DETERMINED BY THE NUMBER OF REJECTIONS THAT HAD SEARCH AND SEIZURE AS THE BASIS FOR THE REJECTION. AN EQUALLY CORRECT REASON FOR REJECTION (AND THE ONE FREQUENTLY LISTED IN A REJECTION) IS INSUFFICIENCY OF THE EVIDENCE — EVEN WHEN THE INSUFFICIENCY RESULTS FROM AN ALLEGEDLY IMPROPER SEARCH AND SEIZURE. WHEN THE LATTER REASON IS GIVEN, IT IS NOT PICKED UP AS A

SEARCH AND SEIZURE REJECTION, AND THUS IS NOT COUNTED IN STATISTICAL STUDIES ANALYZING THE EFFECT OF SEARCH AND SEIZURE CASES ON INTAKE REJECTION IN CALIFORNIA.

ANOTHER POINT CONCERNING THE INSLAW STUDY SHOULD BE MADE. IT IS INTERESTING TO NOTE THAT FULLY 4 TIMES AS MANY CASES WERE REJECTED AT INTAKE IN CALIFORNIA BECAUSE OF SEARCH AND SEIZURE ISSUES THAN WERE REJECTED ON THE SAME ISSUES IN THE DISTRICT OF COLUMBIA. ONE MAJOR DIFFERENCE BETWEEN THE TWO JURISDICTIONS IS THAT LOS ANGELES COUNTY MUST TAKE INTO CONSIDERATION THE SEARCH AND SEIZURE CASES HANDED DOWN BY THE CALIFORNIA SUPREME COURT, WHEREAS THE COURTS IN THE DISTRICT OF COLUMBIA ARE REQUIRED TO ONLY FOLLOW THE FEDERAL RULES INTERPRETING THE UNITED STATES CONSTITUTION.

IT IS IMPORTANT TO NOTE THAT THE INTAKE REJECTION OF CASES ON SEARCH AND SEIZURE GROUNDS IS ONLY THE INITIAL POINT WHERE SEARCH AND SEIZURE IS CONSIDERED IN THE CALIFORNIA COURT PROCESS. IN OUR COURTS, MOTIONS TO EXCLUDE EVIDENCE CAN BE MADE IN THE PRELIMINARY HEARINGS AND AT DIFFERENT TIMES IN SUPERIOR COURT AS THE MATTER WENDS ITS WAY FROM MOTIONS THROUGH TRIAL. EACH TIME ONE OF THE MOTIONS TO SUPPRESS EVIDENCE IS MADE, ALL OR A PORTION OF THE EVIDENCE CHALLENGED MAY BE EXCLUDED. UNLESS THE MOTION IS GRANTED IN WHOLE, OR AS A RESULT OF THE COURT'S RULING A CASE IS DISMISSED, THE SYSTEM OFTEN DOES NOT CATCH THAT DECISION TO REMOVE FROM THE TRIER OF FACT THE ABILITY TO CONSIDER A PIECE OF EVIDENCE. THE WEAKENED CASE MAY THEN BE PLEAD OUT TO A LESSER CHARGE, WITH THE CORRECT REASON BEING INSUFFICIENCY OF THE EVIDENCE TO PROVE THE MORE SERIOUS OFFENSE. AGAIN, THERE IS NO STATISTICAL DATA TO IDENTIFY THE CAUSE OF THE REDUCTION AS BEING A SEARCH AND SEIZURE EXCLUSION. LIKEWISE, A TRIER OF FACT MAY HEAR THE WEAKENED CASE AND FIND THE DEFENDANT GUILTY ONLY OF A LESSER CHARGE, OR FIND THE DEFENDANT NOT GUILTY, BECAUSE EVIDENCE HAD BEEN PREVIOUSLY EXCLUDED. AS ABOVE, THE FACT THAT THE TRIER OF FACT ONLY FOUND GUILT ON THE LESSER CHARGE WILL IN NO WAY BE STATISTICALLY ATTRIBUTED TO THE EFFECT OF SEARCH AND SEIZURE DECISIONS IN CALIFORNIA.

A STUDY THAT HAS ATTEMPTED TO LOOK INTO THE ISSUE OF THE EXCLUSIONARY RULE WAS DONE BY THE GENERAL ACCOUNTING OFFICE. (IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, APRIL 19, 1979). THE CONCLUSION OF THE STUDY WAS THAT ONLY 4/10 OF 1% OF THE CASES WERE REJECTED AT SCREENING, BASED ON SEARCH-AND-SEIZURE ISSUES. IT ALSO INDICATED THAT 16% OF THE DEFENDANTS CHARGED FILED

A SUPPRESSION MOTION, AND THAT THE DENIAL RATES RAN FROM 80-90%.

A COMPARISON CAN BE MADE BETWEEN THE G.A.O. STUDY AND AN ANALYSIS OF FILED MISDEMEANOR CASES DISMISSED ON SEARCH AND SEIZURE GROUNDS DURING A ONE-AND-ONE-HALF-MONTH PERIOD AT THE BEGINNING OF 1981 IN A JUDICIAL DISTRICT IN THE COUNTY OF LOS ANGELES. DURING THAT PERIOD (DECEMBER 1, 1980, TO JANUARY 15, 1981) APPROXIMATELY 390 CASES REACHED DISPOSITION. DURING THIS PERIOD, 31 MOTIONS TO DISMISS WERE MADE AND 16 GRANTED. THUS, 4.10% OF ALL CASES DISPOSED OF WERE LOST BECAUSE EVIDENCE WAS SUPPRESSED. IN THIS SAME JUDICIAL DISTRICT, 13% OF DEFENDANTS ARE NOT CONVICTED; OF THESE, 31% WERE LOST DUE TO SEARCH AND SEIZURE PROBLEMS.

AS CAN BE SEEN, THERE APPEARS TO BE A DIFFERENCE BETWEEN THE NUMBERS OF CASES REJECTED AT INTAKE AND/OR DURING THE COURT PROCESS WHEN COMPARISONS ARE MADE BETWEEN THE EFFECT OF THE FEDERAL EXCLUSIONARY RULE IN FEDERAL CASES AND THE EFFECTS OF THE EXCLUSIONARY RULE AS APPLIED BY THE CALIFORNIA COURTS IN CALIFORNIA CASES.

ALTHOUGH THERE ARE FEW STUDIES ANALYZING THE EXCLUSIONARY RULE'S EFFECTS, THOSE THAT DO EXIST ARGUABLY SHOW A SUBSTANTIAL EFFECTUAL DIFFERENTIATION BETWEEN THE RULES AS ENUNCIATED UNDER THE UNITED STATES CONSTITUTION AND THOSE ANNOUNCED BY OUR CALIFORNIA SUPREME COURT AND APPLIED TO CALIFORNIA CASES.

VI. CONCLUSION

THE ILLUSTRATIONS AND EXAMPLES CITED HERE ARE MEANT TO SHOW THE TYPE OF IMPACT THE PROPOSED AMENDMENT WILL HAVE ON CALIFORNIA CRIMINAL LAW. IT IS NOT DESIGNED TO SURVEY EVERY CASE OR SITUATION WHERE CALIFORNIA RULES DIFFER FROM THOSE MANDATED BY THE UNITED STATES CONSTITUTION. IT DOES SHOW, HOWEVER, HOW THE CALIFORNIA COURTS HAVE IGNORED THE UNITED STATES SUPREME COURT AND HAVE EXPANDED THE EXCLUSION OF EVIDENCE UNREASONABLY. MOREOVER, IN ALL OF THE AREAS CITED, THE COURT HAS IMPOSED ITS VIEWS ON THE PEOPLE OF THIS STATE BY JUDICIAL FLAT, WITHOUT THE BENEFIT OF ANY PUBLIC DEBATE, OFTEN BY AS FEW AS A BARE MAJORITY OF FOUR OF THE CALIFORNIA SUPREME COURT.

THE CASE ILLUSTRATIONS ALSO SHOW THE EXTENT TO WHICH THE CALIFORNIA COURTS IN CHARTING THEIR OWN COURSE AWAY FROM THE UNITED STATES CONSTITUTION HAVE FAILED TO MEET THE GOALS SET IN PEOPLE V. CARAN 25 YEARS AGO.

CARAN PROMISED WORKABLE RULES GOVERNING SEARCHES AND SEIZURES THAT WOULD PROTECT BOTH THE RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION AND THE INTERESTS OF SOCIETY IN SUPPRESSION OF CRIME. WHAT WE HAVE GOTTEN IS NOT A BALANCE BETWEEN THESE COMPETING INTERESTS BUT A SYSTEM OF JUSTICE HEAVILY WEIGHTED IN FAVOR OF THE CRIMINAL DEFENDANT --A SYSTEM THAT GIVES THE DEFENDANT FAR MORE RIGHTS THAN HE'S ENTITLED TO UNDER THE UNITED STATES CONSTITUTION.

CARAN ALSO PROMISED THAT THE EXCLUSIONARY RULE WOULD NOT BE ARBITRARY IN ITS APPLICATION AND WOULD REJECT NEEDLESS LIMITATIONS ON THE RIGHT OF THE POLICE TO CONDUCT REASONABLE SEARCHES AND SEIZURES. YET THE EXCLUSIONARY RULE AS ENUNCIATED BY THE CALIFORNIA SUPREME COURT, PUNISHES GOOD FAITH POLICE MISTAKES AND MINOR INTRUSIONS INTO ONE'S PRIVACY WITH THE SAME SANCTIONS AS ARE APPLIED TO INTENTIONAL AND SUBSTANTIAL POLICE MISCONDUCT. DECISIONS ARE RENDERED WITH LITTLE REGARD AS TO WHETHER THEY ARE DETERRING UNREASONABLE POLICE CONDUCT.

IN OVERRULING THE PRIOR CASES REJECTING THE EXCLUSIONARY RULE, THE CARAN COURT STATED: "SINCE EXPERIENCE IS A CONTINUOUS PROCESS, IT FOLLOWS THAT A RULE OF EVIDENCE AT ONE TIME THOUGHT NECESSARY TO THE ASCERTAINMENT OF TRUTH SHOULD YIELD TO THE EXPERIENCE OF A SUCCEEDING GENERATION WHENEVER THAT EXPERIENCE HAS CLEARLY DEMONSTRATED THE FALLACY OR UNWISDOM OF THE OLD RULE." IN THE 25 YEARS SINCE CARAN, EXPERIENCE REQUIRES ANOTHER CHANCE. THE PROPOSED AMENDMENT WOULD NOT CURE ALL THE ILLS OF STATE'S CRIMINAL JUSTICE SYSTEM. IT WOULD, HOWEVER, PREVENT THE CALIFORNIA SUPREME COURT FROM UNILATERALLY EXTENDING THE RIGHTS OF THE CRIMINAL DEFENDANT BEYOND THOSE RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION. WHEN EXPERIMENTATION IS DESIRED, THIS AMENDMENT ENABLES THE CALIFORNIA LEGISLATURE, IN OPEN PUBLIC DEBATES, TO DETERMINE WHAT RESTRICTIONS, IF ANY, SHOULD BE PLACED UPON THE ADMISSION OF EVIDENCE BEYOND THOSE PROVIDED FOR IN THE UNITED STATES CONSTITUTION.

S.C.A. 7 WILL HOPEFULLY STRIKE THE BALANCE SOUGHT BY THE CARAN COURT AND WILL RESTORE TO OUR JUDICIAL SYSTEM SOME OF THE RESPECT AND CONFIDENCE IT HAS LOST.

VII.

FOOTNOTES

1. CALIFORNIA SUPREME COURT CASES SPECIFICALLY CITING CALIFORNIA CONSTITUTION ARTICLE 1, SECTION 13 AS THEIR FOUNDATION INCLUDE: PEOPLE V. KRIVDA, 8 C 3d. 623 (ART. 1, SEC. 19); PEOPLE V. BRISENDINE, 13 CAL 3d. 328; PEOPLE V. NORMAN, 14 CAL 3d. 929; SURROWS V. SUP. CT., 13 CAL. 3d. 238; PEOPLE V. LONGWILL, 14 C. 3d. 943; PEOPLE V. MAHER, 17 C 3d. 196; PEOPLE V. ZELINSKI, 24 C. 3d. 357; PEOPLE V. BLAIR, 25 C. 3d. 640. PEOPLE V. MARTIN, 45 C. 2d. 755, AND KAPLAN V. SUPERIOR COURT, 6 C. 3d 150, HAVE BEEN CITED AS BEING CONSTITUTIONAL IN ORIGIN. SEE PEOPLE V. NORMAN, AT PAGE 939.

CASES CITING CALIFORNIA CONSTITUTION ARTICLE 1, SECTION 15, INCLUDE PEOPLE V. PETTINGILL, 21 C. 3d. 231; PEOPLE V. DISBROW, 16 C. 3d. 101.

CASES RELYING ON DEAL STATE AND FEDERAL CONSTITUTIONAL GROUNDS INCLUDE: PEOPLE V. SCOTT, 16 C. 3d. 242; PEOPLE V. RUCKER, 26 C. 3d. 368.

BECAUSE THESE CALIFORNIA DECISIONS HAVE BEEN HELD BY THE COURT AS BEING CONSTITUTIONAL, RATHER THAN BEING A JUDICIALLY DECLARED RULE OF EVIDENCE, AS WAS THE HOLDING IN CABAN, THEY CANNOT BE ALTERED, AMENDED, OR OVER-RULED BY STATUTE. THEY CAN BE REACHED ONLY BY BEING EXPRESSLY OVER-RULED BY THE COURT, OR BY CONSTITUTIONAL AMENDMENT.

2. LIPSON, SERRANO V. PRIEST, I AND II. THE CONTINUING ROLE OF THE CALIFORNIA SUPREME COURT IN DECIDING QUESTIONS ARISING UNDER THE CALIFORNIA CONSTITUTION, 10 U.S.F. L. REVIEW, 694, 721.



State of California
 Department of Justice
George Deukmejian
 (PRONOUNCED DUKE-MAY-JIN)
 Attorney General

800 CAPITOL MALL, SUITE 300
 SACRAMENTO 95814
 (916) 445-0888

March 11, 1982

Honorable Charles M. Mathias, Jr.
 United States Senator
 Chairman, Senate Judiciary
 Subcommittee on Criminal Law
 Dirksen Senate Office Building
 Room 2226
 Washington D.C. 20510

Dear Senator Mathias:

Each application of the Exclusionary Rule exacts a telling social price: the search for truth at trial is subverted by the suppression of relevant, reliable evidence. Each time truth is barred from the courtroom, each time the criminal goes free because the constable blundered, public respect for our judicial system diminishes. This is especially so when the Exclusionary Rule excuses a heinous offense by reason of an unintentional or insubstantial violation of privacy.

Traditionally, the Rule has been justified as a deterrent to police misconduct. However, a majority of the United States Supreme Court has now recognized that the Rule's deterrent effect is a fragile assumption, not a hard fact. (United States v. Janis (1976) 428 U.S. 433, 450-454.) Similarly, Law Professor Dallin Oaks has concluded: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." (37 U.Chi.L.Rev. 665, 755 (1970).) The reasons for this failure are readily apparent. Search and seizure rules have become incomprehensibly complex; police cannot follow rules they cannot fathom. The sanction of suppression is indirect; indeed, the officer seldom learns that his actions have been judicially condemned.

Accordingly, I endorse S. 751 as a workable legislative alternative to a costly but ineffective judicial Rule. I recognize, however, that S. 751 would not apply to the States and that the State of California will benefit only by the predictable judicial extension to the States of the restricted Exclusionary Rule proposed by S. 101. In this regard, I support the proposal of the United States Department of Justice to modify S. 101 to adopt a "good faith" Exclusionary Rule, a reform my office has urged in California.

Most cordially,

George Deukmejian

George Deukmejian

Enclosure.

Attached is a working paper prepared by the California Attorney General's Office on the subject of the Exclusionary Rule. We are utilizing this document as a basis for urging the adoption of a good faith Exclusionary Rule by California Courts.

Under separate cover, we will forward to you a list of cases from California which demonstrate abuses of the Exclusionary Rule.

TOWARD A GOOD FAITH EXCLUSIONARY RULE

A Working Paper

by

The California Attorney General's Office

However we may prize our right of privacy, suppressing the truth, freeing the guilty, frustrating victims and punishing society is a high price to pay. Our present Exclusionary Rule exacts this price, generally without compensating society by deterring official misconduct. The Exclusionary Rule must be modified so that its effect fulfills its declared purpose: deterrence. No longer should we suppress evidence acquired by police officers who reasonably and in good faith believed their actions satisfied Fourth Amendment requirements.

Purposes of the Exclusionary Rule

The United States Supreme Court has justified the Exclusionary Rule on three grounds: as inherent in the defendant's constitutional right of privacy; as necessary to preserve judicial integrity; as required to deter police misconduct. See generally, Note, 12 Amer. Crim. L.Rev. 507 (1975). Unlawfully seized evidence was first suppressed to remedy an invasion of the accused's personal Fourth Amendment right of privacy. Weeks v. United States (1914) 232 U.S. 383, 398; Connolly v. Medalie (2d Cir. 1932) 58 F.2d 629, 630. Under this theory evidentiary use of illegally seized property constituted a continuing violation of protected privacy. Bernardi, The Exclusionary Rule: Is A Good Faith Standard Needed to Preserve A Liberal Interpretation of the Fourth Amendment?, 30 De Paul L.Rev. 51, 56 (1980). In 1955, the California Supreme Court concluded that exclusion "could not be justified on that theory," however, and made its rejection of the personal right concept the basis for abrogating the traditional standing requirement. People v. Martin (1955) 45 Cal.2d 755, 759-760. Subsequently, the

United States Supreme Court agreed that

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' home and effects cannot be restored. reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." United States v. Calandra (1974) 414 U.S. 338, 347. Accord, Elkins v. United States (1960) 364 U.S. 206, 217.

Since the constitutional violation is complete at the moment of unlawful intrusion, Stone v. Powell (1976) 428 U.S. 465, 540 (dissent of White, J.), subsequent use, direct or indirect, of the products of the intrusion "work no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. at 354-355.

Abandonment of the personal right theory by severing the remedy from the right makes possible the repudiation of the Exclusionary Rule. Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L.Rev. 251, 254, 271 (1974).

The "imperative of judicial integrity" was the next doctrine devised to justify suppression of evidence. First styled the "clean hands" or "dirty business" doctrine, this concept originated as rhetoric inspired by the common desire of Justices Brandeis and Holmes to impose the Exclusionary Rule before accumulated experience had indicated the inadequacy of existing alternatives. Olmstead v. United States (1927) 277 U.S. 438, 470, 483-484 (dissenting opinions of Brandeis, J., and Holmes, J.). Both justices clearly identified their views as non-constitutional law, however. Id. at 466, 469-470, 479.

Thereafter, Elkins v. United States, 364 U.S. at 217, Mapp v. Ohio (1961) 367 U.S. 643, 660, and Linkletter v. Walker, 381 U.S. at 635, all contained a "ritualistic

reference" to the "imperative of judicial integrity."

Schrock and Welsh, 59 Minn. L.Rev. at 263. California similarly rationalized adoption of the Exclusionary Rule:

"Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business.'" People v. Cahan (1955)

44 Cal.2d 434, 445.

The California Supreme Court, too, has from time to time adverted to the "imperative of judicial integrity." E.g., People v. Benford (1959) 53 Cal.2d 1, 15; People v. Blair (1979) 25 Cal.3d 640, 655.

The essence of the "imperative" has proved elusive. Sometimes couched in terms of judicial self-respect, it appears more concerned with public respect for the judiciary. Under this theory exclusion is necessary to avoid judicial complicity in unlawful police conduct. See Bernardi, 30 De Paul L.Rev. at 56-57. Acknowledged as non-constitutional law by its innovators, the doctrine has been criticized as unconstitutional by one commentator, Monaghan, The Supreme Court 1974 Term, Foreword: Constitutional Common Law, 89 Harv. L.Rev. 1, 5 (1975), and as "a bootless and rarefied essence" by others, Schrock and Welsh, 59 Minn. L.Rev. at 265.

While a rhetorical success, the judicial integrity doctrine is an analytical failure. The reason is plain: "exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214, 223 (1978). Accord, State v. Bisaccia (N.J. 1971) 279 A.2d 675, 676-677; Burger, Who Will Watch the Watchman, 14 Am. U.L.Rev. 1, 12 (1964); Thompson, The Burger Court in the California Crystal

Ball, 5 S.W. U. L.Rev. 238, 240-241 (1973). Dean Barrett asks,

"Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?"

Barrett, Exclusion of Evidence Obtained by Illegal Searches - A Comment on People v. Cahan, 43 Calif. L.Rev. 565, 582 (1955). The public answers "Yes." "The solid majority of Americans rejects the idea that '[t]he criminal is to go free because the constable has blundered.'" Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027, 1035 (1974). Accord, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 927 (1973). In 1981 a national magazine poll revealed that 70 percent of those asked had little or no confidence in the ability of our courts to convict and sentence criminals. NEWSWEEK, March 23, 1981, p. 49. "[T]he prototype of these complaints is enforcement of the exclusionary rule," Professor Kaplan adds. 26 Stan. L.Rev. at 1035-1036.

The Exclusionary Rule applies notwithstanding the inadvertent or minimal nature of the police intrusion or the heinous nature of the accused's offense. "[T]his lack of proportionality," Kaplan explains, "demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Ibid. Removed from the context of egregious police misconduct (misdemeanors in Olmstead and Cahan) the judicial integrity doctrine becomes self-defeating.

The "imperative of judicial integrity" has not been the basis for deciding cases. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 669 (1970). Despite the "imperative," defendants may be brought to trial although illegally seized outside the jurisdiction. Gerstein

v. Pugh (1975) 420 U.S. 103, 119; Frisbie v. Collins (1952) 342 U.S. 519; People v. Bradford (1969) 70 Cal.2d 333, 344. Their prosecutions may be initiated by indictments supported by illegally seized evidence. United States v. Calandra, 414 U.S. at 349-352. At trial, defendants may not challenge on Fourth Amendment grounds evidence that was obtained by police in violation of another's right of privacy. United States v. Salvucci (1980) 448 U.S. 83, 94; Alderman v. United States (1969) 394 U.S. 165. Nor may the accused object to evidence improperly seized by a private citizen. Burdeau v. McDowell (1921) 256 U.S. 465; Dyas v. Superior Court (1974) 11 Cal.3d 628, 632. Evidence indirectly derived from an unlawful search may be admissible if sufficient "attenuation" is shown, Brown v. Illinois (1975) 422 U.S. 590, and the direct fruits of the search may be used to impeach the defendant, Walder v. United States (1954) 347 U.S. 42. Even if improperly admitted, unconstitutionally obtained evidence may be declared "harmless". Chapman v. California (1967) 386 U.S. 18. Evidence secured in violation of the Fourth Amendment may be considered for purposes of sentencing, United States v. Schipani (2d Cir. 1970), 435 F.2d 26, 28 cert. denied, 401 U.S. 983 (1971), and probation revocation, United States v. Vandemark (9th Cir. 1975) 522 F.2d 1019, 1021. Further, neither federal nor California courts will review Fourth Amendment claims on habeas corpus. Stone v. Powell (1976) 428 U.S. 465; In re Sterling (1965) 63 Cal.2d 486. None of these decisions, nor those refusing to apply the Exclusionary Rule in civil proceedings, United States v. Janis (1976) 428 U.S. 433; Emslie v. State Bar (1974) 11 Cal.3d 210, or retroactively, Linkletter v. Walker, *supra*, Desist v. United States (1969) 394 U.S. 244; People v. Edwards (1969) 71 Cal.2d 1096, can be squared with the "imperative of judicial integrity."

The judicial integrity theory failed the retroactivity test. "[I]n Linkletter deterrence became the dispositive consideration in the exclusion controversy." Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & C. 343, 352 (1980). "Indeed, all of the cases since Wolf [v. Colorado (1949) 338 U.S. 25] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." Linkletter v. Walker, 381 U.S. at 636-637. The retroactivity cases taught that judicial integrity is not impaired by the introduction of evidence seized in good faith reliance on existing constitutional norms. United States v. Peltier (1976) 422 U.S. 531, 537.

The deterrence rationale did not merely eclipse the judicial integrity theory, it absorbed it. Relegated to marginal status in Calandra, 414 U.S. at 355, n.11, the judicial integrity doctrine ceased to exist independently in Michigan v. Tucker (1974) 417 U.S. 433, 450 n.25:

"It has been suggested that courts should exclude evidence derived from 'lawless invasions of the constitutional rights of citizens,' Terry v. Ohio, 392 U.S., at 13, in recognition of 'the imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence."

The Court's reasoning was elaborated in United States v. Janis, 428 U.S. at 458 n.35:

"The primary meaning of 'judicial integrity' in the context of evidentiary rules is that courts must not commit or

encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. See United States v. Calandra, 414 U.S. at 347, 354. The focus must therefore be on the question whether the admission of evidence encourages violations of the Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

See also Stone v. Powell, 428 U.S. at 485; Tisnado v. United States (9th Cir. 1976) 547 F.2d 432, 456. Just as abandonment of the personal right theory makes possible complete repudiation of the Exclusionary Rule, the decline of the judicial integrity rationale clears the way for the Rule's reform.

A California intermediate appellate court anticipated this development. People v. Gurley (1972) 23 Cal.App.3d 536, 553 recognized that

"The imperative of judicial integrity cannot be decisive. . . . It can merely categorize a result which must be founded on other criteria. If the search is valid because the officers acted reasonably the court need not be embarrassed in admitting the evidence."

Although the California Supreme Court has disregarded the "imperative of judicial integrity" when suppression could not deter, Dyas v. Superior Court (1974) 11 Cal.3d 628, 632; Emslie v. State Bar (1974) 11 Cal.3d 210, 226-230; In re Martinez (1970) 1 Cal.3d 641, 650, the court periodically

invokes the doctrine to reinforce the deterrence rationale. E.g., People v. Blair (1979) 25 Cal.3d 640, 656. Resort to the "imperative" suggests a desire to preserve the integrity of the Exclusionary Rule rather than an effort to preserve judicial integrity. Undermining the reliability of verdicts is, after all, a curious way to uphold the integrity of the courts. The California Supreme Court may recognize the judicial integrity doctrine as a last defense for an Exclusionary Rule ultimately shown to be without deterrent effect. The California Court of Appeal decision in Jennings v. Superior Court (1980) 104 Cal.App.3d 50, presages such an approach. Contra, People v. Carnesi (1971) 16 Cal.App.3d 863, 868-869. In that event it will not be judicial integrity which is defended but the power of judicial review.

The fall of the judicial integrity doctrine marked the rise of the deterrence rationale. Long acknowledged as the "basic purpose" of California's Exclusionary Rule, People v. Parham (1963) 60 Cal.2d 378, 385; In re Martinez (1970) 1 Cal.3d 641, 648, deterrence has become the "sole consideration" governing the United States Supreme Court's suppression of evidence. Sunderland, 71 *Judicature* at 353.

The deterrence rationale appears to have come full circle. Always concerned with discouraging "unlawful police conduct," United States v. Calandra, 414 U.S. at 347, suppression of evidence originally was intended as a substitute for punishment of the offending officer. "Deterrence" meant that the officer would not have acted as he did had he known that the courts would exclude illegally obtained evidence. The critical element was the officer's state of mind: he should have known better. Thus Elkins and Mapp spoke of "removing the incentive" to disregarding Fourth Amendment rights. 364 U.S. at 217, 222; 367 U.S. at 656. This view was a natural consequence of the fact that Mapp

and Weeks v. United States (1914) 232 U.S. 383, involved flagrant Fourth Amendment violations. Similarly, People v. Cahan presented a pattern of deliberate, flagrant, and sustained police misconduct. See Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 322.

As time passed and police methods improved the Court's focus shifted from sanctioning official misconduct to giving new substantive content to the Fourth Amendment. "Deterrence" came to mean motivation of "the law enforcement profession as a whole - not the aberrant individual officer - to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." Dunaway v. New York (1979) 442 U.S. 200, 221 (concurring opinion of Stevens, J.). The Exclusionary Rule became a tool for expanding judicial review.

The broadened deterrence rationale is seriously flawed. It assumes that Fourth Amendment rules will be explicitly formulated and effectively communicated. In fact, neither condition exists. Bernardi, 30 De Paul L.Rev. at 77 n.153. Instead, the rules governing search and seizure have been made hopelessly complex. Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L.Rev. 736, 740 (1972). Rules which cannot be understood cannot deter. Additionally, "[t]here is reason to believe that the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule." Oaks, 37 U.Chi. L.Rev. at 730. Lack of communication between police and prosecutors is aggravated by the delay endemic to the judicial process. Few officers, apprized of the reviewing court's evaluation of their actions, can remember the specific circumstances in which, long ago, they acted. Moreover, the institutional deterrence concept fails to appreciate that the exclusion sanction is powerless to deter conduct not directed at gathering evidence. Barrett,

Personal Rights, Property Rights and the Fourth Amendment,
1960 Supreme Court Review 46, 54-55.

The Supreme Court recently recognized that an Exclusionary Rule disassociated from the state of mind of the acting officer does not deter. In Michigan v. Tucker (1974) 417 U.S. 433, 447, the Court said

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The United States Supreme Court has reasserted its original concept of deterrence, one that demands a plausible causal connection between the sanction of exclusion and the future conduct of the police. Despite occasional similar outbursts of pragmatism at the intermediate appellate level, e.g., People v. Newell (1979) 93 Cal.App.3d 29, 38; People v. Moore (1973) 31 Cal.App.3d 919, 924, the California Supreme Court seems disinclined to follow suit. E.g., People v. Teresinski, 26 Cal.3d 457, 463, remanded for further consideration in light of United States v. Crews, 450 U.S. 914 (1980). On the contrary, the state high court finds reason for suppressing rather than admitting evidence on the officer's subjective state of mind. People v. Miller (1972) 7 Cal.3d 219, 226. Contra, Scott v. United States (1978) 436 U.S. 128, 136-137.

The Exclusionary Rule serves a fourth purpose: it affords judicial review of Fourth Amendment claims, thereby allowing the Court to reformulate substantive rights. Apart from Mr. Justice Brennan's dissent in United States v. Peltier, 422 U.S. at 554, judges have not alluded to this justification. Of course, one cannot reasonably expect a court to admit it suppresses the truth and releases criminals into society in order to provide grist for the judicial mill. Commentators have noted this function of the suppression doctrine, however. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. & C. 255, 260 (1961); La Fave, 1 Search and Seizure, A Treatise on the Fourth Amendment, 29, 33-34 (1978); Oaks, 37 U.Chi. L.Rev. at 756; Bernardi, 30 De Paul L.Rev. at 101; Sunderland, 71 Judicature at 373.

The substantive results of judicial access to the Fourth Amendment via the Exclusionary Rule have produced mixed reviews. Professor La Fave concludes "[o]ne of the virtues of the exclusionary rule . . . is that it provides the higher courts with a sufficiently steady diet of Fourth Amendment issues to make possible a meaningful shaping of constitutional standards governing arrest and seizure." 1 Search and Seizure at 33-34. Bernardi, on the other hand, argues that the Supreme Court has so compromised substantive privacy rights with evidentiary consequences that "the present exclusionary rule, instead of befriending the fourth amendment, may have become the primary hindrance to its liberal interpretation." 30 De Paul L.Rev. at 101. Bernardi would agree that "a remedy - restrictive result is preferable to a right - destructive result." Note, 55 Wash. L.Rev. 849, 861 (1980). To the extent that development of Fourth Amendment rights is influenced by either the distasteful consequence of suppression or by recognized limitations on the Rule's deterrent effect, e.g., Terry v. Ohio (1968) 392 U.S. 1, 12-

13, Bernardi correctly concludes that the purpose of judicial review is subverted. 30 De Paul L.Rev. at 81.

Whatever may be its substantive limitations, the Exclusionary Rule is thought to resolve two problems of judicial review: jurisdiction and incentive to litigate. Similar difficulties arise in the context of retroactivity. In Stovall v. Denno (1967) 388 U.S. 293, 306, speaking through Mr. Justice Brennan, the Court explained that "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies,³ and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law," disfavor purely prospective decisions.

Justice Brennan's fear, expressed in dissent in Peltier, is that a rule which diverts judicial inquiry from the objective reasonableness of police conduct to the policeman's subjective state of mind will have the practical effects of discouraging defendants' Fourth Amendment claims and of restricting judicial attention to police motives. 422 U.S. at 554. Who will urge new law if the inevitable response must be that the challenged evidence is admissible because the officer acted in good faith reliance on old law?

That judicial review is an unstated justification for the Exclusionary Rule does not mean that it is unimportant. Indeed, to assure judicial acceptance any modification of the Exclusionary Rule must not defeat judicial review. A reasonable good faith standard, by retaining an objective element permits, even necessitates, judicial review. Bernardi, 30 De Paul L.Rev. at 101. "Only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at the time he acted knew or should have known that his conduct was impermissible." Note, The Proposed Good Faith Test for

Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915, 942 (1978). For example, in United States v. Calandrella (6th Cir. 1979) 605 F.2d 236, 247-252, the reviewing court first decided that a search violated the rule of United States v. Chadwick (1977) 433 U.S. 1, then held Chadwick nonretroactive.

Linkletter v. Walker (1965) 381 U.S. 618, 622 n.3, answers jurisdictional objections:

"It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . .

However, no doubt was expressed of our power in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)."

California's Justice Traynor agrees:

"Each part of the bifurcated decision springs from an actual controversy between the parties. . . . each part of the decision is essential to a proper resolution of the case. Neither is dictum."

Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hast. L.J. 533, 560 (1977).

Accord, Currier, Time and Change in Judge - Made Law:

Prospective Overruling, 51 Va. L.Rev. 201, 216-227 (1965);

Beytagh, Ten Years of Non-retroactivity: A Critique and A Proposal, 61 Va. L.Rev. 1557, 1615 (1975).

Thus, a decision holding police conduct unreasonable in the constitutional sense but admitting evidence because the police acted in good faith and with a reasonable basis for the belief that their conduct was lawful does not constitute an advisory opinion forbidden by the case of controversy requirement of Article III of the federal Constitution.

The Supreme Court may feel it has presently available more cases than required to define the contours of the Fourth Amendment. See Arkansas v. Sanders (1979) 442 U.S. 753, 757. At all events, the Court need not worry about a lack of future litigants. As Justice Traynor points out, "institutional litigants with recurring interests in overturning legal rules would find incentive and reward enough" in achieving reforms regardless of whether their individual clients directly benefitted. 28 *Hast. L.J.* at 547. Professor Beytagh concurs:

"A public defender's office, for example, would have considerable incentive to seek a change in constitutional rules even though the benefit would accrue only to those involved in later cases. So would other organizations that regularly represent criminal defendants. . . . [T]he chances seem slim indeed that a constitutional issue of some importance, as to which a judge-made change in law is a reasonable possibility, will not be raised and presented effectively." 61 *Va. L.Rev.* at 1614.

In California, as there exists no constitutional obstacle to advisory opinions the state supreme court is free to make new rules purely prospective. Mills v. Municipal Court (1973) 10 Cal.3d 288, 308. Moreover, the practice of criminal law is highly institutionalized at both the trial court and appellate courts levels in California. Accordingly, adoption of a reasonable good faith Exclusionary Rule would not deprive California courts of the opportunity to construe state constitutional guarantees of privacy.

Deterrence in the Balance

Assessing the deterrent effect of the Weeks rule Mr. Justice Jackson concluded in 1954,

"What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure by federal officers. . . . The extent to which the practice was curtailed, if at all, is doubtful."

Irvine v. California (1954) 347 U.S. 128, 135 (plurality opinion).

Empirical studies conducted since support no different conclusion today. Commentators uniformly pronounce these studies "inconclusive". E.g., Oaks, 37 U.Ch. L.Rev. at 709; Sunderland, 71 J. Crim. L. & C. at 365; Bernardi, 30 De Paul L.Rev. at 75; Canon, The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?, 62 Judicature 398, 403 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent To Police?, 62 Judicature 404, 405 (1979). "[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." United States v. Janis, 428 U.S. at 449-450. Worse, reliable statistics do not appear to be forthcoming. Id. at 450-453.

Absent empirical evidence the Exclusionary Rule rests upon the assumption that it acts as a substantial and efficient deterrent. United States v. Janis, 428 U.S. at 453. This is a precarious perch, for the Rule's deterrent force "is not so inherently likely that we can assume it to exist in the absence of proof." Wright, 50 Tex. L.Rev. at 741. On the contrary, the presumption of deterrence conflicts with common experience. Undeniably, the Rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting

or are willing to forgo successful prosecution in the interest of serving some other goal." Terry v. Ohio (1968) 392 U.S. 1, 14. At the same time, "No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." People v. Gurley (1972) 23 Cal.App.3d 536, 553. Accord, Michigan v. Tucker (1974) 417 U.S. 433, 447. Police cannot follow rules they cannot fathom. People v. Escamilla (1976) 65 Cal.App.3d 558, 563, held that a nonlawyer magistrate cannot issue a search warrant because search-and-seizure law is beyond the comprehension of the lay mind. Contra, People v. Mack (1977) 66 Cal.App.3d 839, 844. In any event, the police officer infrequently learns that his actions have been judicially condemned, Kaplan, 26 Stan. L.Rev. at 1032, and the sanction of suppression is indirect, Schlesinger, 62 Judicature at 408. "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics (1971) 403 U.S. 388, 416 (dissenting opinion of Burger, C. J.). Moreover, while the sanction is limited to evidence offered at trial, most cases are plea-bargained. Professor Oaks concludes: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." 37 U.Chi. L.Rev. at 755. Although statistical evidence is inconclusive there are many reasons to doubt the Rule's efficacy as an indirect deterrent.

Recognition that deterrence is a fragile assumption rather than a hard fact made all but inevitable the balancing approach adopted in United States v. Calandra (1974) 414 U.S. 338. Calandra signalled a discriminating application of the suppression doctrine that is the antithesis to Mapp:

"As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 414 U.S. at 348.

Balancing deterrence against potential damage to the role and functions of the grand jury, the Court found that "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," 414 U.S. at 351, and, therefore, refused to extend the Exclusionary Rule to grand jury proceedings.

Following Calandra, the Court found insufficient deterrent effect to warrant extending the Exclusionary Rule to civil proceedings, United States v. Janis, 428 U.S. at 454, or to federal habeas corpus, Stone v. Powell, 428 U.S. at 487, 489-495. For the same reason the Court refused to suppress evidence seized incident to arrest pursuant to a subsequently invalidated statute, Michigan v. De Fillippo (1979) 443 U.S. 31, or evidence seized during a search conducted under long-standing judicially approved administrative regulations later held unconstitutional, United States v. Peltier, 422 U.S. at 538-542. In Michigan v. Tucker (1974) 417 U.S. 433, 446-447, deterrence was weighed and found wanting in a Fifth Amendment exclusionary context. These decisions are consistent with pre-Calandra rulings limiting retroactive operation of new Fourth Amendment doctrine, e.g., Desist v. United States (1969) 394 U.S. 244, 254 n.24, and permitting impeachment use of illegally seized evidence, Walder v. United States (1954) 347 U.S. 62.

The reasoning of Calandra cannot be confined to considering whether to expand the scope of the Exclusionary Rule. Although each of the cited decisions refused to extend the Rule, for the same reason United States v. Salvucci (1980) 448 U.S. 83, 94-95, narrowed the Rule by overruling

the "automatic standing" doctrine of Jones v. United States (1960) 362 U.S. 257. The United States Supreme Court's determination not to subvert the guilt determining process of a criminal trial by suppressing evidence unless "the sanction serves a valid and useful purpose," Michigan v. Tucker, 417 U.S. at 446, invites reform, not mere resistance to change. The logic of Calandra's balancing approach leads ineluctably to the conclusion reached in United States v. Peltier, 422 U.S. at 542:

"If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

"The Constitution does not demand Judicial overkill." People v. Carnesi (1971) 16 Cal.App.3d 863, 869.

Present Acceptance of Good Faith Exclusionary Rule

A good faith standard already has gained limited acceptance in the form of exceptions to the present Exclusionary Rule. These exceptions fall into two general categories: "technical violations" and "good faith mistakes". Mr. Justice Powell describes as "technical" Fourth Amendment violations in which "officers in good faith arrest an individual in reliance on a warrant later invalidated³ or pursuant to a statute that subsequently is declared unconstitutional. . . ." Brown v. Illinois (1975) 422 U.S. 590, 611 (concurring opinion of Powell, J.). Because suppression does not deter undesirable conduct in such cases Justices Powell and Rehnquist would not apply the Exclusionary Rule. Id. at 612. In these circumstances suppression discourages desired police conduct.

In Michigan v. De Fillippo (1979) 443 U.S. 31,

the Court agreed, holding valid an arrest made in good faith reliance on a city ordinance later held unconstitutionally vague. "A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional," the Court explained. 443 U.S. at 37-38. Deterrence is both unlikely and undesirable. "Society would be ill served if police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Id.* at 38. Accord, People v. Carnesi (1971) 16 Cal.App.3d 863; contra, Jennings v. Superior Court (1980) 104 Cal.App.3d 50.

De Fillippo creates a qualified exception. Where the statute invoked does not define a substantive criminal offense but instead expressly authorizes searches and seizures infringing Fourth Amendment rights the Court will strike down the statute rather than uphold the search. Ybarra v. Illinois (1979) 444 U.S. 85, 96 n.11; Berger v. New York (1967) 388 U.S. 41. This distinction is best explained by the requirements of judicial review. Judicial scrutiny of a statute denouncing criminal conduct is a necessary incident of affirming a conviction. Upholding executive actions taken under a search statute, however, effectively removes the legislation from court review. The difference between Peltier and Ybarra is that Almeida-Sanchez v. United States (1973) 413 U.S. 266, provided the Court the opportunity to invalidate the regulation under which the searching officer acted in Peltier. Having condemned the agency's regulation in Almeida-Sanchez, the Court could condone the officer's reliance in Peltier.

Just as De Fillippo and Peltier establish that law enforcement may rely upon a statute or regulation not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws,"

Michigan v. De Fillippo, 443 U.S. at 38, the Court's retroactivity decisions make clear that officers may rely upon judicial decisions. E.g., Fuller v. Alaska (1968) 393 U.S. 80, 81.

A majority of the Supreme Court has yet to accept Justice Powell's suggestion that the Exclusionary Rule should not be imposed in warrant cases. Since the bulwark of the Fourth Amendment is the Warrant Clause, Franks v. Delaware (1978) 438 U.S. 154, 164, and "[t]he entire thrust of the exclusionary rule . . . is to encourage the use of search warrants," People v. Moore (1973) 31 Cal.App.3d 919, 927, the proposal seems irresistible. However, although the Exclusionary Rule "has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation," People v. Kirk (1974) 43 Cal.App.3d 921, 925; accord, State v. Gerardo (N.J. 1969) 250 A.2d 130 133, the Court has repeatedly suppressed the fruits of searches conducted by state officers under warrants supported by affidavits which failed to supply probable cause. Whitely v. Warden (1971) 401 U.S. 560; Aguilar v. Texas (1964) 378 U.S. 108.

State courts nevertheless have shown increasing reluctance to suppress evidence seized pursuant to defective warrants supported by probable cause. People v. Ramirez (1981) ___ Cal.App.3d ___, upheld a search incident to an arrest pursuant to a warrant which, unknown to the arresting officer, had been withdrawn. Accord, People v. Lent (N.Y. Sup. Ct. 1980) 433 N.Y.S.2d 538. Richmond v. Commonwealth (Ky. 1981) ___ S.W.2d ___, 50 U.S.L.W. 2162, refused to exclude evidence obtained by a search under a warrant issued by a judge while outside his territorial jurisdiction. People v. Arnow (N.Y. Sup.Ct. 1981) 436 N.Y.S.2d 950, characterized a magistrate's failure to endorse a warrant

for nighttime service as a "technical defect" not requiring exclusion of evidence. Sternberg v. Superior Court (1974) 41 Cal.App.3d 281, declined to suppress evidence because a magistrate had inadvertently neglected to sign the warrant after finding probable cause. Each opinion emphasized the good faith reliance of the police.

The "good faith mistake" exception includes both reasonable mistakes of law and of fact. Mr. Justice White has articulated its rationale:

"When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstances in the future. . . ." Stone v. Powell (1976) 428 U.S. 465, 540 (dissenting opinion of White, J.).

Consensual searches often have been upheld on the basis of an officer's reasonable, good faith--but mistaken--belief that the consenting party had authority to permit the search. In People v. Gorg (1955) 45 Cal.2d 776, 783, Justice Traynor wrote:

"[W]hen as in this case the officers have acted in good faith with the consent and at the request of a homeowner in conducting a search, evidence so obtained cannot be excluded merely because the officers may have made a reasonable mistake as to the extent of the owner's authority."

Although the United States Supreme Court has not yet ruled on this question, United States v. Matlock (1974) 417 U.S. 164, 177 n.14, most other deciding courts have endorsed Justice

Traynor's view. E.g., People v. Adams (N.Y. 1981) 422 N.E.2d 537, 540-541; cf. United States v. Wyler (S.D.N.Y. 1980) 502 F.Supp. 969, 973-974.

It is noteworthy that these apparent consent cases do not involve a mistake of fact, but a misunderstanding of law. Their true explanation is found in California cases which acknowledge that "Policemen are not required to be experts in the law of landlord and tenant." People v. Robinson (1974) 41 Cal.App.3d 658, 666; People v. Jackson (1970) 14 Cal.App.3d 57, 68. The distinction between mistakes of fact and law is significant given judicial reluctance to excuse legal misjudgments by police. See People v. Teresinski, 26 Cal.3d at 463. Except under unusual circumstances courts do not forgive an officer's mistaken assessment of his power to arrest or search. Compelling circumstances did arise in People v. Walls (N.Y. 1974) 363 N.Y. S.2d 82, where New York police, arresting fleeing suspects on the New Jersey side of the Lincoln Tunnel, failed to comply with New Jersey's fresh pursuit statute. The New York court admitted the fruits of a search incidental to their arrest. Cf. People v. Orlosky (1974) 40 Cal.App.3d 935. Assuming adoption of a general good faith standard of exclusion, courts are likely to remain more willing to find reasonable a mistake of fact than a mistake of law relating to police powers. Accordingly, a reasonable good faith test need not undermine the constitutional standard of probable cause.

Hill v. California (1971) 401 U.S. 797, presented a mistake of fact. Having probable cause to believe Hill had committed robbery, police went to his apartment without a warrant. Miller, who conformed to descriptions of Hill given to the officers, opened the door. The police, skeptical of Miller's identification, of his explanation for his presence and of his professed ignorance of a pistol and ammunition clip in plain view, arrested Miller believing he

was Hill. Ultimately, Miller was released. Meanwhile, officers conducted a search of Hill's premises incident to Miller's arrest. People v. Hill (1968) 69 Cal.2d 550, 552.

Both the California Supreme Court, id. at 553, and the United States Supreme Court, 401 U.S. at 804, held that the officers' reasonable, good faith mistake did not invalidate the arrest and, consequently, the incidental search. Neither court held that the police had probable cause to believe that Miller was Hill and, hence, probable cause to arrest Miller. At the least, these decisions mean that such probable cause existed. At the most, the opinions stand for the proposition that the Exclusionary Rule should not be invoked to sanction an arrest on less than probable cause where the officer's misjudgment is both reasonable and in good faith. At the moment, the meaning of the Hill opinions is unclear. Their future significance may lie in the fact that the kind of mistake of fact involved cannot be fairly distinguished from any probable cause determination.

The United States Supreme Court has accepted the good faith mistake of fact exception in another context. Franks v. Delaware (1978) 438 U.S. 154, limits attacks on warrant affidavits to false statements made intentionally or with reckless disregard for their truth. In California only reasonable misstatements and omissions are completely forgiven in warrant affidavits. People v. Kurland (1980) 28 Cal.3d 376; Theodor v. Superior Court (1972) 8 Cal.3d 77.

Each of these good faith exceptions is compelled by the balancing approach of Calandra. Just as the rationale of Calandra cannot be confined, these exceptions cannot be contained. In other words,

"The decisional history of the exclusionary rule following Mapp must be seen as a gradual, yet inexorable movement towards adoption of a

good faith standard to govern application of the rule." Bernardi, 30 De Paul L.Rev. at 58.

Four sitting Supreme Court justices have expressed their willingness to so modify the Exclusionary Rule. Chief Justice Burger, concurring in Stone v. Powell 428 U.S. at 536-542, Mr. Justice White, dissenting in Stone v. Powell, 428 U.S. at 536-542, and Mr. Justice Powell, joined by Mr. Justice Rehnquist, concurring in Brown v. Illinois, 422 U.S. at 609-612, all have supported some form of good faith test. Mr. Justice Blackmun recognized that good faith significantly reduces deterrence in United States v. Janis, 428 U.S. at 459 n.35. All subscribed to Peltier's dictum that the deterrent purpose of the Exclusionary Rule is served "only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.

While the declared Justices await a fifth vote, or Congressional action, or a suitable case, or a good faith formula acceptable to a majority, or an opportunity to clarify particularly murky Fourth Amendment waters before altering their basic approach to exclusion, other lawmakers have tired of waiting.

In United States v. Williams (5th Cir. 1980) 622 F.2d 830, cert. denied 449 U.S. 1127 (1981), a case involving a federal officer's good faith mistake about his power to arrest, the United States Court of Appeals for the Fifth Circuit declared:

"Sitting en banc, we now hold that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable,

though mistaken, belief that they are authorized." Id. at 840.

State judges in Virginia, Holloman v. Commonwealth (Va. 1981) 275 S.E.2d 620, 622; Abell v. Commonwealth (Va. 1980) 272 S.E.2d 204, 210, and Florida, Walden v. State (Fla. Ct.App. 1981) 397 So.2d 368, 369, have expressed their willingness to follow Williams were they free to do so. In June, 1981, the Colorado legislature enacted a good faith Exclusionary Rule. C.R.S. 1973, § 16-3-308. The American Law Institute, Model Code of Pre-Arrest Procedure, Proposed Official Draft No. 1, § 290.2 (1972), and the Attorney General's Task Force on violent crime, Final Report, § 40 (1981), have urged similar reforms. It is time for the judges who created the Rule to reform it. "When the reason of a rule ceases, so should the rule itself." Calif. Civil Code § 3510.

The Good Faith Exclusionary Rule in Action

Critics of the present Exclusionary Rule recognize its "important symbolic significance," Kaplan, 26 Stan. L.Rev. at 1055, and acknowledge that it "teaches the importance attached to observing" Fourth Amendment guarantees. Oaks, 37 U.Chi. L.Rev. at 711. Critics of proposed good faith rules fear that "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio (1964) 379 U.S. 89, 97. A good faith rule incorporating an objective element responds to both views: it reaffirms the importance of obeying the Fourth Amendment; it affords an avenue of judicial review; it avoids placing a premium on police ignorance; it averts suppressing the truth when no deterrent purpose can be served. Such a rule is offered in United States v. Peltier, 422 U.S. at 542:

"[E]vidence obtained from a search should be

suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

To adopt the Peltier standard is not to embrace the unknown. Useful guidance for applying the new rule is found in opinions elaborating the reasonable good faith defense to suits for damages under the Civil Rights Act, 42 U.S.C. § 2283. See generally, Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915 (1978). These decisions establish a qualified immunity from civil liability for reasonable, good faith actions.

"The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (2d Cir. 1972) 456 F.2d 1339, 1348.

A belief is "reasonable" if it is "reasonable" in the tort sense, although not in the constitutional sense. Id. at 1348-1349 (concurring opinion of Lumbard, J.). This standard is consistent with the qualified immunity principles developed in Pierson v. Ray (1967) 386 U.S. 547, Schever v. Rhodes (1974) 416 U.S. 232, Wood v. Strickland (1975) 420 U.S. 308, and Procunier v. Navarette (1978) 434 U.S. 555.

The burden of proof as to both good faith and reasonableness is placed upon the police officer, who best knows why he acted as he did and whose responsibility it is

to justify a warrantless search or seizure. Badillo v. Superior Court (1956) 46 Cal.2d 269, 272. This allocation also meets the argument that in the probable cause context the objective element of the good faith test tends to become subjective and, therefore, subversive of the language of the Fourth Amendment. See Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & C. 635, 656 (1978).

Reinforcing the objective element of the good faith defense to civil suits is the requirement that officers be aware of "settled, indisputable law" and "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. at 321-322. Police are not expected to predict the future course of constitutional law, however. Pierson v. Ray, 386 U.S. at 557.

"The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law, it is not unreasonable to expect them to have some knowledge of it." Glasson v. City of Louisville (6th Cir.) 518 F.2d 899, 910, cert. denied, 423 U.S. 930 (1975).

Consistently with this rule Peltier sanctions actions if an officer "had knowledge, or may properly be charged with knowledge," of their unconstitutionality. 422 U.S. at 542. This does not undermine the deterrent effect of the Exclusionary Rule, which depends upon police training programs. A reasonable good faith suppression standard would not discourage police legal training. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L.Rev. 1319, 1412-1413 (1975). Accord, Bernardi, 30 De Paul L.Rev. at 106. At the same time, "the good faith standard will

prevent the government from choosing to violate the fourth amendment willfully whenever it is prepared to pay civil damages as the price for securing desired evidence."

Bernardi, 30 De Paul L.Rev. at 102. Cf. People v. Martin (1955) 45 Cal.2d 755, 760.

A reasonable good faith test will probably least effect police stop and frisk practices. Chief Justice Warren emphasized in Terry v. Ohio, 392 U.S. at 14, that the Exclusionary Rule does not deter conduct not directed at gathering evidence. This is particularly true of weapons frisks, undertaken for purposes of self-preservation. Moreover, Terry's "rational suspicion" standard authorizes most conduct an officer reasonably could believe was lawful. Apart from these considerations, it is noteworthy that investigative detentions and pat-searches for weapons are among the least intrusive police actions limited by the Fourth Amendment.

It is in the area of warrantless searches and seizures that the evidentiary consequences of the new rule will be most felt. In the probable cause context "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." Brinegar v. United States (1949) 338 U.S. 160, 176. Frequent disputes between trial and appellate judges and among reviewing judges themselves as to whether probable cause existed on a given state of facts suggests that the present standard does not leave enough room for police error. Stone v. Powell 428 U.S. at 538, 540 (dissenting opinion of White, J.). Increased police training cannot substantially decrease police misjudgments regarding probable cause because "There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances." People v. Ingle (1960) 53 Cal.2d 407, 412. Accord, Go-Bart Importing

Co. v. United States (1931) 282 U.S. 344, 357. The reasonable good faith test will be more tolerant of police error, particularly when officers have acted in urgent circumstances. "An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation." Whirl v. Kern (5th Cir. 1969) 407 F.2d 781, 790. Studied reflection in judicial chambers often produces a decision different from intuitive response on dangerous streets. To the extent these perspectives diverge, exclusion is unlikely to deter.

The Supreme Court may attempt to resolve both the probable cause and scope of incidental search problems by eliminating or significantly reducing police discretion. The "bright line" tests announced in New York v. Belton (1981) ___ U.S. ___, 69 L.Ed.2d 768, and in United States v. Robinson (1973) 414 U.S. 218, mechanically defining the scope of searches permitted incident to arrest, together with the plurality opinion in Robbins v. California (1981) ___ U.S. ___, 69 L.Ed.2d 744, expanding the warrant requirement suggest this approach. Application of a good faith suppression standard would be facilitated. It is easier to decide, for example, whether a warrant was practicably obtainable than to determine the existence of probable cause.

Whether or not the warrant requirement is expanded, reliance upon an apparently valid warrant should constitute reasonable good faith as a matter of law. See Note, 20 Ariz. L.Rev. at 933. This is not to foreclose challenges to affidavits supporting warrants; there the rule should be:

A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

Suppression of evidence is self-defeating when the police do precisely what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," United States v. Ventresca (1965) 380 U.S. 102, 109-110; People v. Superior Court (Johnson) 1972) 6 Cal.3d 704, 711, may well spring from the understood absurdity of excluding evidence not because a constable has blundered, but because a magistrate has miscalculated. State v. Lien (Minn. 1978) 265 N.W.2d 833, 840 n.1.

Although the Supreme Court has excluded evidence obtained from searches authorized by warrants issued upon affidavits later found deficient, e.g., Aguilar v. Texas (1964) 378 U.S. 108, the Court has never explained why. Once exclusion no longer is thought to be a personal constitutional right of the accused, there can be only one justification; deterrence. Deter who? The police have acted as they should. There is "no evidence for the assumption that lawlessness among federal magistrates is a pervasive problem akin to police lawlessness" which inspired the Exclusionary Rule. La Fave, 1 Search and Seizure at 3, quoting Professor Phillip Johnson. The same may be said in defense of state judicial magistrates.

The Aguilar rule began life as an accident, matured into an unexplained assumption, and survives as an obstacle to an essential objective of the Fourth Amendment--to encourage resort to warrants--and to the central purpose of criminal trials--to determine the truth.

The United States Supreme Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in Aguilar v. Texas. Aguilar has been widely accepted as authority for imposition of the exclusionary rule. (See, e.g., United States v. Karathanos, 531 F.2d at

33; In re Martinez (1970) 1 Cal.3d 641, 651, n.8.) In fact, Aguilar did not impose the exclusionary rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page 5 of the Brief for Respondent that a Texas statute, article 727a, VACCP, enacted in 1925, provided:

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

The Supreme Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute, not constitutional compulsion. Application of the exclusionary rule was not before the Court, much less decided, in Aguilar. One year later, on the authority of Aguilar, the Court filed a brief per curiam summary reversal order in Barnes v. Texas (1965) 380 U.S. 253. In light of the Texas statute, Barnes added nothing to Aguilar.

Nevertheless, two years after Aguilar the Court filed its brief per curiam order in Riggan v. Virginia (1966) 384 U.S. 152, declaring:

"The petition for a writ of certiorari is granted. The judgment is reversed. Aguilar v. Texas, 378 U.S. 108."

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. (Hall v. Commonwealth (Va. 1924) 121 S.E. 154, cited in appendix to Elkins v. United States (1960) 364 U.S. 206, 232.) The Supreme Court, like the state appellate court, simply assumed that Aguilar authorized

suppression. (Riggan v. Commonwealth (Va. 1965) 144 S.E.2d 298, 301-302.) In its pleading before the federal high court the state of Virginia did not suggest otherwise. Thus, without argument, without a hearing, without explanation, and, surely, without consideration, Aguilar was deemed authority for a rule it did not announce.

Five years later, in Whitely v. Warden (1971) 401 U.S. 560, a divided Supreme Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again, no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to Mapp v. Ohio (1961) 367 U.S. 643, instead of a reference to Aguilar. Since Mapp was not a warrant case, it did not much improve the Court's legal reasoning. In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the exclusionary rule.

Whitely's reliance on Mapp was almost predictable since the Mapp plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at p. 655. As applied to warrant cases, of course, the quoted language is dictum. That the dictum was followed in Whitely is ultimately traceable to the fact that "[t]he discursive prevailing opinion in Mapp v. Ohio . . . does not clearly identify the primary basis for the rule. . . ." Oaks, 37 U.Chi. L.Rev. at 670. The Court confronted the warrant cases before it clarified the fundamental purpose of the exclusionary rule: deterrence of police misconduct. Had the Court held that purpose firmly in mind when it decided Whitely, logical consistency would have required admission of the seized evidence.

California anticipated the error of Riggan and

Whitely. People v. Berger (1955) 44 Cal.2d 459, a companion case to Cahan, suppressed evidence secured pursuant to a search warrant defective on its face for want of specificity. The Court explained in People v. Keener (1961) 55 Cal.2d 714, 723, that this deficiency resulted in a general warrant not comprehended within the policy of encouraging use of warrants. Unfortunately, before Berger could be explained it was misunderstood. People v. Perez (1961) 189 Cal.App.2d 526, 531, opined:

"It is, of course, clear that if the search warrant was void because issued without probable cause, the search and seizure pursuant to it were illegal and the articles obtained as a result thereof were not admissible as evidence against the appellant. (See People v. Berger, 44 Cal.2d 459, 461 [282 P.2d 509].)"

Ironically, the introduction of Berger by the signal "see" demonstrates that it was anything but "clear" that suppression was required. At all events, given Aguilar and Whitely, Perez is harmless error.

The inescapable logic of Calandra, Tucker, Stone, Janis, Peltier, and De Fillippo is that exclusion is an irrelevant sanction when evidence is acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. See Stone v. Powell, 428 U.S. at 498 (concurring opinion of Burger, C. J.); Brown v. Illinois, 422 U.S. at 609-612 (concurring opinion of White, J.). Why a police officer may rely upon the constitutional validity of a legislative enactment, but not upon a magistrate's determination of constitutional sufficiency remains a puzzle. That both questions are ultimately for judicial determination only heightens the mystery.

CRIMINAL PROCEDURE OMBUDSMAN REVISITED

An Article on the Exclusionary Rule

By

Robert P. Davidow*

George Mason University, School of Law
Arlington, Va.

I. Introduction

In 1973 I proposed that the Exclusionary Rule be replaced by a criminal procedure ombudsman,^{1/} an independent government official^{2/} who, with the help of a number of assistants,^{3/} would investigate instances of alleged police misconduct, publicize the results of such investigations, and authorize the appointment of private counsel at public expense to sue the offending official or officials when the ombudsman found probable cause to believe that an aggrieved person had been subjected to a deprivation of constitutional rights or other rights set forth in statutes or regulations.^{4/} The proposal also would have made possible a recovery against the government in cases in which the fact finder was satisfied that a law violation had occurred but in which it was impossible to identify the offending officer or in which the offending officer had acted in good faith.^{5/} Since the publication of this proposal, the debate over the Exclusionary Rule has continued unabated,^{6/} but no further legislation, either state or federal, has been enacted as a substitute for the rule. Some legislation, however, has been introduced in Congress,^{7/} and hearings have been held.^{7a/} The United States Supreme Court, for its part, has refused to expand the rule,^{8/} and, in the fourth amendment area, has made federal review of state court decisions less likely by severely restricting the opportunities for federal habeas corpus relief.^{9/}

Thus, the problems associated with the Exclusionary Rule - i.e., the possible failure to deter police lawlessness, the release of some guilty persons, and the failure to provide a remedy for the innocent - remain.^{10/} Although the extent of these problems is disputed,^{11/} one may conclude not merely that each of these deficiencies of the rule continues in some measure, but also that the public^{probably} perceives that these deficiencies exist.^{12/}

*The article expresses the views of Professor Davidow only and are not to be associated with anyone else at George Mason School of Law. The article has been accepted for publication by the Journal of Criminal Law and Criminology of Northwestern University.

NOTE.--Footnotes appear at end of article.

Apart from any other consideration, this public perception must be dealt with. It seems appropriate, therefore, to reconsider the remedy that I suggested in 1973 in the light of pertinent recent developments. Is the basic approach still sound? What adjustments should be made in the light of recent decisions by the United States Supreme Court?

II. The Soundness of the Basic Approach

My premise was that a criminal procedure ombudsman would be an effective method by which to enforce the fourth, fifth, sixth,^{13/} and, in the case of the states, fourteenth amendment limitations on police practices. In the case of the fifth amendment, the assumption was that the criminal procedure ombudsman would be an effective alternative to the exclusion of statements taken in violation of the present Miranda standards that were nevertheless thought to be trustworthy; I assumed that untrustworthy statements, e.g., those which were the result of coercion or promises of leniency, would continue to be inadmissible. I contrasted the proposed ombudsman with the present Exclusionary Rule which, on the basis of earlier studies, I assumed to be lacking in sufficient deterrence.^{14/} Also, of course, I noted the failure of the rule to protect the clearly innocent, who presumably, would have no occasion to invoke the Exclusionary Rule.

A. Satisfaction of the Requirement of Judicial Integrity

Although the deterrence rationale for the Exclusionary Rule is the one chiefly relied upon by the present majority of the United States Supreme Court,^{14a/} a competing rationale, that of judicial integrity, is championed by Justices Brennan and Marshall.^{14b/} There are at least two possible versions of this rationale: The first version is that any admission of evidence seized in violation of the Constitution amounts to unacceptable condonation of the illegality, regardless of whether some other effective remedy is available to enforce the Constitution.^{15/} The second version is premised on the assumption that no effective enforcement mechanism other than the Exclusionary Rule is available.^{16/} If the latter version is the one adopted by Justices Marshall and Brennan, then my proposal will satisfy them if, in fact, the proposed remedy proves to be effective. If, in fact, these justices have adopted the former, non-utilitarian version, my response is that I reject it. Insistence upon adherence to the Exclusionary Rule regardless of the availability of effective alternatives should be re-

jected because this insistence will have the effect of hindering actual enforcement of constitutional restraints while assuring a partial and merely formal compliance, as demonstrated below.

Doubts still remain about the extent to which the rule deters police lawlessness, especially in situations in which police are not primarily interested in successful prosecutions.^{17/} - e.g., where the chief goal is harassment of a disliked group. Moreover, there is no hope, theoretical or otherwise, that the Exclusionary Rule can benefit the innocent victims of police lawlessness.^{17a/} In the light of this, to insist upon the retention of the Exclusionary Rule is to insist upon maintenance of the status quo - i.e., an absence of an effective device by which to prevent police lawlessness - since the political reality is that no effective legislative alternative to the Exclusionary Rule is likely to be enacted if it is thought that the United States Supreme Court will retain the Rule in any event. More effective restraints upon the police are difficult to enact under the best of circumstances;^{18/} certainly, they stand little or no chance of being enacted without a quid pro quo - the abolition of the Exclusionary Rule.

B. Problems With the Argument That the Exclusionary Rule Is
a Requirement of Due Process

It has been suggested that the Exclusionary Rule is a requirement of due process, since due process requires states (by virtue of the due process clause of the Fourteenth Amendment) and the federal government (by virtue of the due process clause of the Fifth Amendment) to adhere to the law of the land.^{19/} Admission of evidence seized in violation of the law of the land is viewed as itself a violation of the law of the land. Such an approach clearly makes utilitarian considerations irrelevant. Surely a strong historical argument can be made that "due process" should be read as "the law of the land."^{20/} It does not follow, however, that the enforcement of the "law of the land" should take any particular form. Although it is possible to read "law of the land" as a requirement that the states adhere to the "law of the land" during each criminal prosecution and to conclude further that the admission of evidence unlawfully seized is a denial of the personal right to be tried in accordance with due process, it is also possible to read "law of the land" as a requirement that each person,

including a defendant in a criminal case, be afforded an effective remedy for any failure on the part of the state or federal government to adhere to the law of the land. This latter interpretation is, of course, consistent with the creation of a substitute for the Exclusionary Rule.^{21/}

C. Unjustifiable Contention That a Convicted Person Has Forfeited the Right to Privacy

It has been suggested that if the person who is the subject of an unreasonable search and seizure is thereafter convicted of a crime on the basis of evidence discovered during the unlawful search, that individual should not be permitted to sue the policeman because his or her right of privacy has not been invaded; that is, his or her involvement in an illegal activity has deprived him or her of his or her right of privacy.^{22/} I reject this thesis because it is premised on a misunderstanding of the Bill of Rights. The fourth amendment does not merely create a right of privacy; it is part of the larger Bill of Rights, which sets forth a proper relationship between the government and the governed.^{23/} That probable cause is found at a particular point in time and justifies subsequent temporary incarceration of an individual,^{24/} does not alter the fact that prior to the discovery of probable cause that individual was entitled to certain liberties vis-à-vis the government.^{24a/} Thus I reject the notion that a right of privacy is forfeited ab initio if it is later discovered that the individual has engaged in unlawful conduct.^{25/} Consequently, I see no reason to distinguish between the situations involving an innocent person who is the subject of an unlawful search and seizure and a person who is later found guilty through evidence seized in violation of that individual's constitutional rights. Reasonable minds may differ about the appropriate way to enforce the Bill of Rights,^{26/} but this difference of opinion does not justify differential treatment for the innocent and those later found guilty of crime. It is possible, of course, that an innocent person will sustain greater damages; that does not mean that a person who is later found guilty has sustained no damage by reason of his or her being subjected to an unlawful search and seizure, or other deprivation of rights.^{27/}

D. Effectiveness of the Criminal Procedure Ombudsman

The central question, therefore, is whether a criminal procedure ombudsman can be an effective mechanism for the enforcement of constitutional and

other limitations on police practices. In my original proposal, the following means of enforcement were provided: (1) publication by the ombudsman of a report outlining violations and non-violations of pertinent rules by the police,^{28/} (2) appointment of private counsel at public expense to sue allegedly offending officials in appropriate courts of law, following a finding of probable cause to believe that there had been a law violation,^{29/} and (3) creation of a cause of action against an individual police officer, where individual responsibility could be assigned, or against the federal government, in those situations in which a law violation had occurred but in which no individual officer could be held responsible, either because of a lack of proof of identity or because of the exercise of good faith on the part of the officer.^{30/} The assumption was that publicity and private law suits against individual police officers, including police supervisors in cases involving failure to promulgate or enforce appropriate regulations for the governance of subordinates,^{31/} would create pressures at all levels of the police hierarchy to adhere to constitutional and other limitations.

One arguable deficiency in this system was the provision for jury trial, which is required in private suits for damage by the seventh amendment.^{32/}

A choice seemingly had to be made between the achievement of two conflicting goals: (a) to provide for personal liability on the part of the police officer (to insure compliance with pertinent limitations),^{33/} or (b) to avoid trial by jury because of the possibility - perhaps probability - that jurors would tend to sympathize unduly with the police and not with the victims of police lawlessness.^{34/} My choice was to retain private law suits, as opposed to general suits against the government, because personal liability is essential to the practical enforcement of constitutional and other limitations.

In the light of some recent seventh amendment cases,^{35/} I have come to the conclusion that the choice outlined above is not a theoretically necessary one; however, a choice must be made between a relatively simple procedural device relying almost exclusively on the ombudsman, and a considerably more complicated enforcement device involving the creation of one or more administrative agencies. For the reasons set forth below I prefer the simpler procedure.

(1) Administrative Agencies to Deal With the Problem of Jury

Trial

Since it is now clear, if it was not before, that the seventh amendment applies only to suits at common law in the ordinary courts and not to the enforcement of civil penalties by the government before administrative agencies,^{36/} it would be possible to modify the ombudsman proposal in the following way: In addition to creating the office of ombudsman, one could create two administrative agencies: (a) a procedural enforcement commission - an independent agency that would seek civil penalties against offending policemen (under the standards set forth under the original proposal), with adjudication before administrative law judges appointed in the usual manner,^{37/} and (b) a victims' compensation commission - an independent agency to which both victims of crime and victims of police lawlessness could go for compensation from the government.^{38/}

(2) Advantages and Disadvantages of the New and Old Proposals

The main advantage of the more recent proposal - i.e. the one that would provide for the creation of two administrative agencies- is the one referred to above: the avoidance of trial by jury in the case of suits against individual police officers. There are at least two disadvantages. First, and perhaps more obviously, a procedure of considerable complexity would be created. One can certainly argue that we have enough complexity as it is today without adding to it. Moreover, there would be additional costs involving two newer agencies; additionally, the present political climate does not favor the creation of new bureaucracies.^{39/}

An additional disadvantage of the more recent proposal relates to the method of appointment of the heads of the agencies. Under Buckley v. Valeo,^{40/} the heads of agencies would unquestionably be officers whose appointments would be governed by the appointments clause.^{41/} Possibly these officers could only be appointed by the President.^{42/} The difficulty is that the President might appoint someone who was not particularly sympathetic to the enforcement of constitutional rights against the police.^{43/} If this were done, it seems unlikely that the creation of such agencies, even with the additional creation of an ombudsman, could be an adequate substitute for the Exclusionary Rule. On the other hand, if enforcement were almost exclusively within the hands of the ombudsman, this individual might be appointed in a manner different

from that specified in the appointments clause. In my original proposal, I suggested that the ombudsman "be selected by the President of the United States from a list of three nominees submitted by a committee composed of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the House Minority Leader, and the Senate Minority Leader."^{44/} My assumption was that such a bi-partisan committee would have to reach some sort of compromise agreement in order to make any recommendation to the President and that at least two members of the committee would insist upon the appointment of someone who was at least not hostile to the enforcement of the Bill of Rights.^{45/} Because the ombudsman could not be an effective substitute for the Exclusionary Rule if the President were totally free to select the ombudsman, I would prefer to adhere to my original proposal for appointment. The question remains, however, whether such a method of selection is consistent with the constitutional requirement - more specifically whether selection of the ombudsman would be covered by the appointments clause. (The originally proposed method of selection, binding the President to select from among a list of three persons submitted to him or her, seems clearly inconsistent with the appointments clause.) The question certainly is not free from doubt; a strong argument can be made, however, that the ombudsman would not be subject to the appointments clause. One could argue that the powers of the election commission in Buckley were considerably broader than, and very different from, the powers entrusted to the ombudsman.^{46/} In fact, the only power of the ombudsman beyond that of merely investigating and reporting^{47/} would be the power to appoint counsel at government expense when the ombudsman found probable cause to believe that an aggrieved person had been the victim of a law violation.^{48/} Thus, Buckley might be distinguished on its facts. Alternatively, the court might be persuaded that the ombudsman as an institution was so different from the traditional three branches of government that the appointments clause ought not to apply.^{49/} The ombudsman arguably would be like a fourth branch of government - totally different from anything contemplated by the framers at the time of the ratification of the Constitution.

A desire to keep the appointment power out of the hands of the President, along with continued doubts about the constitutionality of my original proposal, has led me to propose a totally different method of selection, as set forth below.

III. Proposed Modifications of the Original Proposal

The prior discussion indicates that I would adhere to most of the original proposal.^{50/} In several areas, however, departures from the original plan seem necessary or desirable.

A. Method of Selection

I have already alluded both to the constitutional problems associated with the original plan for selection of the ombudsman, and to the undesirability of permitting the President to select the ombudsman.^{51/} My solution to this dilemma is to provide for appointment of the ombudsman by the United States Supreme Court, acting unanimously.^{52/} A requirement of unanimity would prevent the appointment of someone totally unsympathetic to the enforcement of the Bill of Rights; presumably, at least some members of the Court would be relatively sympathetic to the enforcement of such provisions and could hold out for the appointment of someone with similar attitudes.^{53/} Given the limited power of the ombudsman, it seems likely that the ombudsman could be regarded as "an inferior officer"; as an "inferior officer," the ombudsman probably could be appointed by "the courts of law."^{54/}

The appointment of someone not hostile to the enforcement of the Bill of Rights is so crucial to the effectuation of this proposed alternative to the Exclusionary Rule, that I would expressly provide that if the appointment section of the proposal were held invalid by the court, the whole statute would be inoperative and the Exclusionary Rule would be restored.

B. Limitation of Jurisdiction

My original proposal called for the creation of a national ombudsman who would enforce lawful behavior on the part of all law enforcement personnel, state and federal.^{55/} I argued that Congress could do this in regard to state officials through its power to enforce the due process clause of the fourteenth amendment.^{56/} Arguably, this approach remains sound. If Congress is serious about doing something about the problems of crime and about the problems associated with the Exclusionary Rule, it will do little good to restrict itself to federal law enforcement, since federal law enforcement is such a small part of the total law enforcement picture today.^{57/} It is also true, that Congress, despite some public protestations to the contrary, has continued to intrude into state affairs. One has only to look at the congressional efforts to promote family values and to spend federal monies to accomplish this goal.^{58/}

Upon reflection, however, I believe that it is pointless to propose that Congress act to enforce the Bill of Rights against state authority; the political reality is simply that this is impossible today. Thus, my proposal here is to restrict the ombudsman to the enforcement of constitutional and other legal rights against the federal government. Possibly the federal example will encourage states to adopt similar, effective procedures for the enforcement of the Bill of Rights and other appropriate limitations upon police activity.^{58a/}

C. Mitigation of Lack of Jury Sympathy Toward Plaintiff

The original proposal provided for a jury trial pursuant to the seventh amendment, when an aggrieved person sued an allegedly offending public official or officials. Borrowing from a recent proposal to amend 42 U.S.C. § 1983,^{58b/} I now propose that the federal government, presumably through the Justice Department, be given authority to join as a party plaintiff; such joinder would lessen the disparity in the degree to which each side might elicit sympathy. Without such a joinder, the jury would be likely to sympathize more with the law enforcement official than with the plaintiff; the latter might have a prior criminal record and be guilty of an offense that was the subject of the defendant's unlawful investigation.^{58c/}

D. Method of Compensation

Inflationary trends require a change in regard to compensation. The original proposal was that actual damages, but not less than \$50, be recoverable for every instance of law violation.^{59/} There was also a provision for exemplary damages. The provision for a minimum recovery of \$50 is obviously inadequate today.^{59a/} If one is going to make it unnecessary for Congress to amend the statute on a yearly basis, it seems to make more sense to tie the minimum amount recoverable to some more general standard. For example, minimum amounts that are recovered under the statute might be one and one-half percent of the annual gross income of someone earning the minimum wage for adults.^{60/}

My assumption was originally that there ought to be some minimum amount that should be recoverable in every instance of law violation, as that term is defined in the original proposal. I continue to adhere to this proposition. Although an aggrieved person may not be able to show much in the way of actual damages, it is important that the victim, and society as a whole,

be able to perceive that something is being done to remedy the situation;^{61/} this something must take the form of more than nominal damages.

Conclusion

The Exclusionary Rule has been rather like the weather; many people continue to talk about it, but the state and federal legislatures have persisted in doing nothing about it. The bills that have occasionally been introduced in Congress have either attempted to modify the rule without providing any substitute,^{62/} or have attempted to abolish it altogether while providing an "alternative" that is totally inadequate.^{63/} The challenge is to adopt a remedy that will be effective in insuring that law enforcement officials obey the Constitution and other appropriate limitations upon their authority. Thus, given a choice between adhering to the present Exclusionary Rule and abandoning the rule with no effective alternative, I would unhesitatingly choose to retain the Exclusionary Rule.

As has been pointed out, a reason for some of the opposition to the Exclusionary Rule and to an effective substitute for the Exclusionary Rule may really be an opposition to the substantive rules enunciated by the Supreme Court in interpreting the fourth amendment.^{64/} Thus the underlying problem may be a broad one: a fundamental disagreement about the way in which the government should relate to the governed.^{65/} It is possible that some of the opposition to the enforcement of the Bill of Rights comes from a perception that society is divided into two groups - the law-abiding persons and the criminals - and that the object of law enforcement is to wage war upon the latter.^{66/} Procedural niceties are seen as irrelevant to the prosecution of such a war. The morale of the citizenry is said to suffer if the goal is not total victory. Obviously there is another view of society. For example, the late Lon Fuller emphasized the reciprocal relationship between law-giver and law-receiver, maintaining that law is "the enterprise of subjecting human conduct to the governance of rules."^{67/} In this enterprise, the law-receivers must be convinced that the system is a good one so that they will have an incentive to obey the laws. If they are to feel that the system is a good one, they must be assured that the law-givers will adhere to the law that has been devised to govern the relationship between the government and the people. It can be argued that from this perspective the long-range goal of the criminal law ought to be

to bring those who have been criminally convicted back into the enterprise.^{68/} Total warfare, without adherence to fundamental rules, is hardly calculated to inspire such individuals to participate in the enterprise. I am not suggesting that we "coddle" criminals or that the notion of deterrence has no validity.^{69/} What I am alluding to is the obvious fact that eventually most of the persons who enter prison will return to society. The question, therefore, is whether upon their return they are going to feel a sufficient commitment to the system to obey its rules.^{70/}

It is possible, of course, to take the position that these different perspectives are simply two competing views^{71/} - two different definitions of the situation^{72/} - and that there is no empirical way to demonstrate that one rather than the other perception is "correct." Under these circumstances, we may be forced to resort to history, for at least the history of the ratification of the Constitution and, more specifically, the Bill of Rights tells us something about the attitudes of the framers of the Constitution. We do know that they were opposed to the exercise of unfettered power of the sort that characterized the actions of police before the adoption of the Exclusionary Rule.^{73/} (We note, for example, the concept of separation of powers as embodied in the whole Constitution and more specifically the restraints imposed upon the President, the Congress, and the courts.)^{74/} Part of the difficulty may be that in this country we have not done a very good job of educating the people generally in regard to the principles that underlie our system of government.^{75/} One of the more attractive features of the criminal procedure ombudsman is that the ombudsman, through the power to investigate and report, can probably educate the public more effectively than^{can} any other body.^{76/} One should recall that an ombudsman is not an advocate for one side or the other; he or she is an independent governmental official whose duties include pointing out the successes as well as failures of governmental officials.^{76a/} Given this position of impartiality, the ombudsman is in a better position than is a defense counsel or a member of the A.C.L.U., for example, to explain to the public the rationale for the various limitations on governmental authority in the field of criminal procedure. As a "doer," the ombudsman is also more likely than is the academic critic to have success in educating the public, since many Americans seem to be suspicious of academicians.^{76b/} This greater ability to inform and educate

is an important reason for preferring the ombudsman to other substitutes for the Exclusionary Rule that have been proposed from time to time.^{77/}

The Exclusionary Rule is not an end in itself; it will lose its raison d'être if an effective alternative can be found. The criminal procedure ombudsman is such an alternative.

FOOTNOTES

1/ Davidow, Criminal Procedure Ombudsman as a Substitute for the Exclusionary Rule: A Proposal, 4 Tex. Tech. L. Rev. 317 (1973).

2/ "The Ombudsman is an independent governmental official who receives complaints, conducts investigations, and makes recommendations relating to the actions of other governmental agencies. He succeeds mainly through persuasion, which is made more effective by the publicity which he can give to his recommendations." Id. at 322.

One of the best general treatments of the Ombudsman is found in W. Gellhorn, Ombudsmen and Others (1967). The extent to which the Ombudsman principle has been adopted at various levels of government in the United States is outlined in Hammel, The Ombudsman, Or Citizens' Defender - The North Carolina Experience, 10 N.C. Central L. J. 227, 245-246 (1979). At least five states have adopted the Ombudsman at the state level. Alaska Stat. §§ 24.55.010-340 (1978); Hawaii Rev. Stat. §§96-1 to 96-19 (1976); Iowa Code Ann. §§601G.1-.23 (West 1975 and West Supp. 1981-82); Neb. Rev. Stat. §§81-8, 241 to 8,254 (1976); N.J. Stat. Ann. §§52: 27E-3 to 41 (West Supp. 1981-82). The term "ombudsman" is used in the Alaska, Hawaii, and Iowa statutes. The Iowa statute also uses the term "citizens' aide"; in Nebraska the official is referred to as the "public counsel"; in New Jersey the ombudsman is referred to as the "Office of Citizen Complaints" of the Department of the Public Advocate.

3/ The proposed bill provided for the appointment for not more than 100 assistant ombudsmen; my assumption was that the ombudsmen and assistants would enforce the Bill of Rights and other legal restrictions with respect to both state and federal official actions.

Davidow, supra note 1, at 328, 336.

- 4/ Appointment of private counsel at government expense was regarded as extremely important since, in the absence of such provisions, aggrieved persons "might not have the ability to present their claims without the assistance of counsel, whose fees might exceed the aggrieved person's financial resources." Id. at 320.

The ombudsman was given the power to act with respect to any law violation, defined as any departure from pertinent constitutional, statutory, or regulatory provisions. I accepted the thesis of the late Lon Fuller that it is extremely important to require adherence by the government to its own rules and regulations.

See, id. at 338; L. Fuller, The Morality of Law 81, 209 (rev. ed. 1969).

- 5/ Davidow, supra note 1, at 329, 339.

- 6/ Among the recent discussions of the exclusionary rule are the following:

1 W. LaFare, Search and Seizure 3-39 (1978); S. Schlesinger, Exclusionary Injustice (1977); Comptroller General of the United States, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979); Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 Judicature 66 (1978); Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. and Criminology 343 (1980); Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214 (1978); Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than an "Empty Blessing," 62 Judicature 336 (1979); Wilkey, A Call For Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak, 62 Judicature 351 (1979); Canon, The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?, 62 Judicature 398 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent To Police?, 62 Judicature 404 (1979); Canon, A Postscript on Empirical Studies and the Exclusionary Rule, 62 Judicature 455 (1979); Schlesinger, A Reply to Professor Canon, 62 Judicature 457 (1979); Gottlieb, Feedback From the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?, 67 Ky. L. J. 1007 (1978-79); Roche, A Viable Substitute for the Exclusionary Rule: A Civil Rights Appeal Board, 30 Wash. & Lee L. Rev. 223 (1973); Levin, An Alternative to the Exclusionary Rule for Fourth Amendment

Violations, 58 Judicature 74 (1974); Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974); Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash. U. L. Q. 621; Wilkes, A Critique of Two Arguments Against the Exclusionary Rule: The Historical Error and the Comparative Myth, 32 Wash. & Lee L. Rev. 881 (1975); Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L. J. 447 (1978); Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga. L. Rev. 1 (1975); Boker and Corrigan, Making the Constable Culpable: A Proposal to Improve the Exclusionary Rule, 27 Hastings L. J. 1291 (1976); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974); Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974); Gilligan and Lederer, Replacing the Exclusionary Rule with Administrative Rule Making, 28 Ala. L. Rev. 533 (1977); Hyman, In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective, 10 Pac. L. J. 33 (1978); Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027 (1974); Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Leg. Studies 243 (1973); Ball, Good Faith and the Fourth Amendment: the "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978).

1/ S. 101, 97th Cong., 1st Sess. (1981); S. 751, 97th Cong., 1st Sess. (1981); Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981). The first of these bills would limit the circumstances under which evidence secured in violation of the fourth amendment would be inadmissible. The second and third bills would abolish the exclusionary rule, but would permit a tort action against the federal government for violation of fourth amendment rights (but with severe limitations on the amount of damages that could be collected); ^{they} would authorize disciplinary action against a police officer. See notes 27, 63, infra.

- 7a/ Hearings were held on October 5 and November 12, 1981, before the Subcommittee on Criminal Law of the Senate Judiciary Committee; the proceedings are as yet unreported.
- 8/ See, e.g., United States v. Janis, 428 U.S. 433 (1976); United States v. Calandra, 414 U.S. 338 (1974).
- 9/ See Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Wainwright v. Sykes, 433 U.S. 72 (1977).
- 10/ Other problems associated with the exclusionary rule are discussed in note 27, *infra*.
- 11/ Compare e.g., Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974), with S. Schlesinger, Exclusionary Injustice, 50-60 (1977).
- 12/ For example, in one relatively recent poll, respondents were asked in part whether they agreed or disagreed with the following statement: "Violation of law and order has been encouraged by the courts." Sixty-nine percent expressed agreement; twenty-three percent expressed disagreement; eight percent said that they were "not sure." Erskine, The Polls: Causes of Crime, 38 Pub. Opinion Q. 288, 291 (1974). Although respondents could have had in mind factors other than the exclusionary rule - e.g., lack of sympathy for the substantive decisions in the fourth amendment area or assumptions about undue leniency in sentencing - it is certainly possible that at least some of the criticism of the courts was based on the exclusionary rule. To the extent that other factors, such as dissatisfaction with the substantive fourth amendment rules, were involved, this survey result tends to illustrate that Americans have not been very well educated in fundamental constitutional principles. This in turn suggests the importance of the Ombudsman, who can properly educate the public. See notes 75 and 76, *infra*, and accompanying text.
- 13/ "In the minds of many lawyers the exclusionary rule is probably most closely associated with the holding in Mapp v. Ohio, 367 U.S. 643 (1961), that physical evidence seized in violation of the fourth amendment, as made applicable to the states through the fourteenth

amendment, must be excluded in a state trial.... If, however, the essence of the exclusionary rule is the exclusion of evidence, otherwise trustworthy, because of a violation of an individual's constitutional rights, then the rule encompasses the exclusion of confessions secured in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) (protection of fifth amendment right to be free from self-incrimination through the enforcement of the sixth amendment right to counsel), and *Massiah v. United States*, 377 U.S. 201 (1964) (evidence inadmissible if secured through interference with the attorney-client relationship, as protected by the sixth amendment).

Davidow, *supra* note 1, at 317 n. 1.

14/ E.g., Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970).

14a/ "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim....Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."

United States v. Calandra, 414 U.S. 338, 347 (1974).

14b/ E.g., *United States v. Calandra*, 414 U.S. 338, 355 (1974) Brennan, J. dissenting). Brennan was joined in his dissent by both Justices Marshall and Douglas. Only Justices Brennan and Marshall remain on the court, however.

15/ E.g.:

"The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people - all potential victims of unlawful government conduct - that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."

United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

"For the first time, the Court today discounts to the point

of extinction the vital function of the rule to ensure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct."

Id. at 360.

16/ E.g.:

"The exclusionary rule is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera."

United States v. Calandra, 414 U.S. 338, 361 (1974) (Brennan, J., dissenting).

"It is . . . imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule - entirely apart from any deterrent effect - is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educating force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies.' Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 Chi. L. Rev. 665, 756 (1970). . . . While distinguished authority has suggested that an effective affirmative remedy could equally serve that function, . . . no equally alternative has yet been devised."

United States v. Peltier, 422 U.S. 531, 555 (1975) (Brennan, J., dissenting).

17/ E.g., S. Schlesinger, Exclusionary Justice 56 (1977).

17a/ I admit, of course, that to the extent that fewer innocent persons are subjected to unlawful conduct by the police because of the existence of the exclusionary rule, innocent persons benefit generally from the exclusionary rule. I refer here, however, to innocent persons who are in fact the victims of unlawful police conduct; these people

are, of course, not benefited by the exclusionary rule.

- 18/ Opposition on the part of the police, with some public support, to the notion of civilian review boards illustrates the difficulties that will be encountered in any effort to impose external restraints upon the police. See, Davidow, supra note 1, at 324-25. This is not to suggest that civilian control is everywhere an impossibility. See, Berger, Law Enforcement Control: Checks and Balances For the Police System, 4 Conn. L. Rev. 467, 490 (1972).
- 19/ E.g., Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & Criminology 343, 368-373 (1980).
- 20/ "The origin of the Due Process Clause is Chapter 39 of Magna Carta which declares that 'No free man shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.' (emphasis added.) As early as 1354, the words 'due process of law' were used in an English statute interpreting Magna Carta, and by the end of the 14th Century 'due process of law' and 'law of the land' were interchangeable. Thus the origin of this clause was an attempt by those who wrote Magna Carta to do away with the so-called trials of that period where people were liable to sudden arrest and summary conviction in courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases. Chapter 39 of Magna Carta was a guarantee that the government would take neither life, liberty, nor property without a trial in accord with the law of the land that already existed at the time the alleged offense was committed. This means that the Due Process Clause gives all Americans, whoever they are and wherever they happen to be, the right to be tried by independent and unprejudiced courts using established procedures in applying valid pre-existing laws The due process of law standard for trial is one in accordance with the Bill of Rights and laws passed pursuant to constitutional power, guaranteeing to all alike a trial under the general law of the land.

Duncan v. Louisiana, 391 U.S. 145, 169-70 (1968) (Black, J., concurring) (footnotes omitted).

- 21/ The Supreme Court has required that the federal government adhere to its own regulations, at least in regard to the decision to fire an employee. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957). Generally, the Supreme Court has not required the states to adhere to their own statutes and regulations. But see, Hicks v. Oklahoma, 447 U.S. 343 (1980). The Court, however, has required that the State introduce evidence to establish guilt beyond a reasonable doubt in a criminal case. Jackson v. Virginia, 443 U.S. 307 (1979). Also, the Court has required that the state courts not reinterpret a statute retroactively so as to deprive an individual of fair notice of the standards set forth in the criminal law. Bowie v. City of Columbia, 378 U.S. 347 (1964).
- 22/ S. Schlesinger, Exclusionary Injustice 48-49 (1977); see S. 751, 97th Cong., 1st Sess. 82 (1981).
- 23/ Cf., Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("All these policies point to one overriding thought: the constitutional foundation underlying the privilege against self-incrimination is the respect a government - state or federal - must accord to the dignity and integrity of the citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, an accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from its own mouth.").
- 24/ See Gerstein v. Pugh, 420 U.S. 103 (1975).
- 24a/ "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." Weeks v. United States, 232 U.S. 383, 391-92 (1914).
- 25/ Schlesinger's argument in behalf of the notion that an individual

who is convicted of crime should not have a cause of action for invasion of privacy is based upon the following reasoning:

"If criminal activity is predominantly a public concern, then when the police, either legally or illegally, find evidence of such activity, it is not an invasion of the individual's privacy to use what the police have found against him in a criminal proceeding. Specifically, since criminal activity is not private, a location is not private if activities of great public concern - crimes - are committed or concealed there; thus, the police cannot be not denied access to the location of the crime on the ground of protection of privacy."

S. Schlesinger, supra note 22, at 48.

This is sheer sophistry. The right of privacy is most assuredly not lost merely because something of public importance is occurring in what would otherwise be a private location. One of the best illustrations of this is Griswold v. Connecticut, 381 U.S. 479 (1965),

in which the Supreme Court held that the right of privacy attached to the use of contraceptives by married couples, despite a Connecticut statute ^{that} purported to prohibit the use of such contraceptives. If Schlesinger's argument were to prevail, then clearly the majority opinion in Griswold would have to be overturned, for the activity was criminal under the Connecticut statute and therefore was a matter of public interest.

In any event, Schlesinger is not totally consistent in his position, because he does acknowledge that, although an individual who is convicted of a crime does not have an action against the police, the offending official is still to be disciplined. S. Schlesinger, supra note 22, at 71. If the officer is to be disciplined, there must be a reason for it; the only reason that logically suggests itself is that the officer has been guilty of a violation of someone's constitutional rights.

26/ Compare, e.g., Gilligan and Lederer, Replacing the Exclusionary Rule with Administrative Rulemaking, 28 Ala. L. Rev. 533 (1977), and Boker and Corrigan, Making the Constable Culpable: A Proposal to Improve the

Exclusionary Rule, 27 Hasting L. J. 1291 (1976), with Kamisar, The Exclusionary Rule in Historic Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337 (1979), and Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L. J. 681 (1974).

27/ This is one of the reasons for my opposition to S. 751, 97th Cong., 1st Sess. (1981), and Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981), both of which provide in part: "Notwithstanding sub-sections (b) and (c), the recovery of any person who is convicted of any offense for which evidence of such offense was seized in violation of the fourth amendment to the United States Constitution is limited to actual physical personal injury and to actual property damage sustained as a result of the unconstitutional search and seizure."

Other objections to the Exclusionary Rule have been voiced. It has been suggested, for example, that "the necessity of excluding obviously probative evidence under the rule has placed increasing pressure on judges to sanction dubious searches and seizures based on dangerously expanded notions of probable cause." S. Schlesinger, Exclusionary Injustice 63 (1977). It may be, however, that the judges who are tempted to do this are not particularly sympathetic to the assertion of rights under the Bill of Rights; such judges, even in a non-exclusionary context, might give a rather narrow interpretation to the guarantees provided in the Bill of Rights.

Another criticism of the rule is that "a rule the exclusionary rule which is supposed to discipline and improve police conduct actually results in encouraging highly pernicious police behavior. The policeman is supposed to tell the truth, but when he knows that describing the search truthfully will taint the evidence and free the suspect, the policeman is apt to feel that he has a 'higher duty' than the truth. He may perjure himself to convict the defendant." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215, 226 (1978). If this criticism is taken seriously, then it calls into question any

alternative to the Exclusionary Rule, because presumably any alternative would involve at least some disciplinary procedure directed at the police. See, e.g., S. Schlesinger, Exclusionary Injustice 72-76 (1977). Presumably at such a disciplinary proceeding, the police officer would have at least as much an incentive to lie as such a police officer has now in the context of the administration of the Exclusionary Rule; indeed, it can be argued that the police officer would have an even greater motive to falsify in light of the fact that presumably direct action would be taken against the police officer. Although police fabrication may be a problem, it is thus not a problem peculiar to the Exclusionary Rule.

Another criticism of the Rule is that it imposes the same "penalty" - that is, exclusion of evidence - regardless of the degree of culpability of the officer. See Wilkey, Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 215, 226 (1978). Presumably this objection is encompassed within the arguments for a good faith exception to the Exclusionary Rule. See note 30, infra. My proposed statute deals with that problem by permitting the plaintiff to recover against the government in those situations in which it appears that a police officer has acted in reasonable good faith.

Another criticism of the rule is that it makes it "virtually impossible for any state, not only the federal government, to experiment with any other methods of controlling police." Id. at 227. However, as Professor Kamisar has pointed out, "for many decades the majority of the states had no exclusionary rule but none of them developed any meaningful alternative. . . This half-century of post-Weeks 'freedom to experiment' did not produce any meaningful alternative to the Exclusionary Rule anywhere." Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 336, 346 (1979).

28/ Davidow, supra n. 1, at 328, 334. The importance of publicity is illustrated by the following:

"To buttress their own persuasiveness external critics rely heavily on favorable public opinion. They make annual reports to their creators, usually the national legislators, and may report additionally when they wish."

W. Gellhorn, Ombudsman and Others 437 (1967).

29/ See note 4, *supra*.

30/ It is already clear, for example, that state law enforcement officials, when sued under 42 U.S.C. §1983, can defend on the ground that their arrest was based on probable cause to believe that the persons arrested had violated a statute subsequently found to be unconstitutional. Pierson v. Ray, 386 U.S. 547 (1967) (dictum). The present provision incorporates this standard. This use of the concept of "good faith" must, of course, be distinguished from the suggestions that the present exclusionary rule simply be restricted to those instances in which the police officers acted in the absence of good faith.

See U.S. v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 101 S.Ct. 946 (1981); Statement of D. Lowell Jensen, Attorney General, Criminal Division, U.S. Department of Justice, before the Criminal Law Subcommittee of the Senate Judiciary Committee, October 5, 1981.

Although my proposal does not purport to be merely a limitation upon the exclusionary rule in favor of the policeman who has acted in good faith, some of the discussion regarding the good faith exception to the exclusionary rule is pertinent here. Most commentators assume that the action based upon subjective good faith must also be reasonable. The question arises whether an action of the police should be regarded as reasonable if the mistake is based, on the one hand, on a miscalculation of the facts necessary to constitute probable cause, or, on the other hand, on a failure to anticipate a new constitutional decision by the United States Supreme Court, a warrant subsequently found invalid, or a precedent later overruled. In Pierson, the mistake was a failure to anticipate a later court decision declaring a statute unconstitutional; at first glance this seems to be a clear instance of the situation in which the policeman ought to be able to rely on what appears the current law, when he or she is personally sued. Some of the

difficulties encountered in knowing whether it is reasonable for a policeman to assume that the present law is valid are illustrated in *Michigan v. DeFillipo*, 443 U.S. 31 (1979). Arguably, the other type of "good faith" mistake should not exonerate the policeman from personal liability; after all, the notion of probable cause includes the notion of reasonableness, and if the policeman acted reasonably (apart from situations in which a warrant was required), there was, by definition, no violation of the Constitution. If a court later decides that the action of the policeman was not reasonable, there seems little basis for exonerating the policeman. In regard to the warrant situation, it is so easy to get a warrant that it does not seem unreasonable to require that the policeman, when in doubt, apply for a warrant.

For a general discussion of the "good faith" exception to the Exclusionary Rule, see, for example, Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978).

The defense of "good faith" should be distinguished also from proposals to modify the exclusionary rule by permitting admission of evidence where the violation of the Constitution was not "substantial." See, e.g., Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga. L. Rev. 1 (1975); S. 101, 97th Cong., 1st Sess., (1981). Although the "good faith" exception to the exclusionary rule may involve a measure of subjectivity, such subjectivity pales in comparison with that contained in the substantiality test. For example, S. 101 permits the court to consider the following factors in determining whether to admit the evidence: "(1) The extent to which the violation was reckless; (2) The extent to which privacy was invaded; (3) The extent to which exclusion will tend to prevent such violations; and, (4) Whether, but for the violation, the thing seized would have been discovered; or whether the relation between the things discovered and the violation is attenuated."

31/

"It is important to set forth explicitly the liability of the superior police officer or official; particularly it is important to

establish affirmatively a requirement that the official set forth regulations for the governance of the actions of his subordinates. Although the Ombudsman might in some instances be concerned with the substance of the regulations (as for example, where they appeared to be unlawful or unconstitutional), the more important aspect of the problem seems to be the requirement that some kind of rules be established. After all, as Professor Lon Fuller has struggled mightily to maintain, a legal system presupposes a set of rules which the law-giver, as well as the citizen, will obey. The exercise of unlimited discretion by public officials is the antithesis of a legal system. I here accept Lon Fuller's assumption that if public officials are required to publicize their standards and policies, a better system of administration will result."

Davidow, supra n. 1, at 338 (footnotes omitted).

- 32/ "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
U.S. Const. amend. VII.

- 33/ The importance of personal liability on the part of the individual police officer is illustrated by Chief Justice Burger's criticism of the exclusionary rule:

"The exclusionary rule does not apply any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence in a criminal trial. With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the Suppression Doctrine."

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

- 34/ See, e.g., Newman, Suing the Lawbreakers: Proposals to Strengthen the §1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978).

- 35/ See cases discussed in note 36, infra.

- 36/ In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court held that the

seventh amendment guaranteed a right of jury trial in an action for damages and injunctive relief under the Fair Housing Provisions of the Civil Rights Act of 1968, 42 U.S.C. §3612. In so doing the Court said:

"Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

Id. at 194.

In Pernell v. Southall Realty, 416 U.S. 363 (1974), the Court upheld the right under the seventh amendment to a jury trial in a suit for eviction in the courts of the District of Columbia. In dictum, the Court said:

"We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency."

Id. at 383.

In Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), the Court upheld the action of an administrative agency in seeking abatement of actions in violation of the Occupational Safety and Health Act of 1970, and civil penalties from employers without a jury trial. Said the Court in part:

"At least in cases in which 'public rights' are being litigated - e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact - the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."

Id. at 450 (footnote omitted).

"In sum, the cases discussed above stand clearly for the proposition that when Congress creates new statutory

'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.' Congress is not required by the Seventh Amendment to choke the already crowded federal courts with new types of litigation or prevented from committing some new types of litigation to administrative agencies with special competence in the relevant field. This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency."

Id. at 455 (footnote omitted).

There seems little doubt that actions by the federal government to enforce constitutional restraints upon law enforcement officials would constitute the litigation of "public rights," as that phrase is used in Atlas Roofing. It may be argued that this approach by the Supreme Court exalts form over substance in that the forum seems to be the determinative factor, rather than the nature of the action itself. If so, this is hardly the only instance in which the court has exalted form over substance. See, e.g., Patterson v. New York, 432 U.S. 197 (1977) (defendant could be required to prove absence of mitigating circumstance in homicide prosecution because absence of mitigating circumstance was not explicitly made an element of the offense, even though a contrary result had previously been reached in regard to the common law offense of murder because it was assumed that at common law the definition of murder included the notion of an absence of provocation).

37/ Hearings before such administrative law judges would be preferable to the administrative remedies suggested by Schlesinger, who proposed the creation of an independent review board to discipline offending police officers. Schlesinger suggested that the board consist of "citizens, judges, law officers and any other groups whose

representation may be desirable." S. Schlesinger, *Exclusionary Injustice* 73 (1977). I see no reason to have police officers sit on a board to review the action of other police officers. If we analogize this situation to a jury trial, one can be reasonably certain that counsel opposing the police officer would exercise his or her peremptory challenges so as to insure the absence from the jury of any member of a law enforcement agency. I see no reason why a police officer should be better off before an independent review board than before a jury in regard to the makeup of the factfinding body.

38/ Giving the same commission power to compensate victims of crime as well as victims of police lawlessness might increase the political acceptability of such a scheme, in light of present proposals to create agencies to compensate victims of crime. For discussion of victim compensation schemes, see, for example, McGee: Crime Victim Compensation, 5 J. Contemp. L. 67 (1978).

39/ See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357 (1981).

40/ 424 U.S. 1 (1976).

41/ "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone in the Courts of Law, or in the Heads of Departments."

U.S. Const. art. II, §2, cl. 2.

In Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court held that members of the Federal Election Commission were officers of the United States whose appointment was controlled by the Appointments Clause. The Court said in part:

"We think its [the Appointment Clause's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in

the manner prescribed by §2, cl. 2, of that Article.

"If 'all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other modes of these appointments' . . . it is difficult to see how the members of the Commission may escape inclusion. If a Postmaster first class, . . . and the clerk of a district court, . . . are inferior officers of the United States within the meaning of the Appointment Clause, as they are, surely the Commissioners before us are at the very least such 'inferior officers,' within the meaning of that Clause."

424 U.S. at 126 (footnote omitted).

"Unless their selection is elsewhere provided for, all Officers of the United States are to be appointed in accordance with the Clause. Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the Heads of Departments, or by the Judiciary. No class or type of officer is excluded because of its special functions."

Id. at 132.

42/ See, Hobson v. Hansen, 265 F. Supp. 902, 920 (D.D.C. 1967) (Wright, Cir. J., dissenting).

43/ If the appointments to the federal bench can be taken as an indication of the likely approach to the appointment of an ombudsman by the President, then one has reason to fear that the President would appoint someone with views fairly similar to his or her own; if the President happened to be unsympathetic to the enforcement of the Bill of Rights, then, of course, the difficulty mentioned in the text would be realized. For documentation of the principle that Presidents have tended to appoint those from their own party (and hence those who presumably have similar views) see, for example, L. Berkson and S. Carbon, The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates 134 (Table 8-3) (1980).

44/ Davidow, supra note 1, at 327.

45/ Compromise is required because each party has, in effect, a veto power over the choices of the other party. C f. Davidow, Judicial Selection: The Search for Quality and Representativeness, 31 Case W. Res. L. Rev. 409, 440-41 (1981) (application of the principle of enforced compromise through the exercise of the veto power in the context of the work of a judicial nominating commission).

46/ The federal election commission was given "extensive rulemaking and adjudicative powers."

Buckley v. Valeo, 424 U.S. 1, 110 (1976).

47/ "Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them."

Buckley v. Valeo, 424 U.S. 1, 137 (1976).

48/ Davidow, supra note 1, at 328.

49/ The founding fathers undoubtedly assumed that all powers could be categorized as either legislative, executive, or judicial:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim upon which it relies has been totally misconceived and misapplied."

The Federalist, No. 47 at 313 (Bicentennial ed., 1976) (Madison).

Since the Ombudsman, under my original proposal, would have no real power at all, except the power to speak and to provide for the payment of private counsel at government expense under certain

circumstances, it can be argued plausibly that the appointments clause, which supposes a tri-partite form of government, ought not to apply to the appointment of such an Ombudsman.

50/ See notes 28-49, supra, and accompanying text.

51/ See notes 40-49, supra, and accompanying text.

52/ See note 41, supra.

53/ See note 45, supra, and accompanying text.

54/ See note 41, supra.

"Finally; it is objected that the Act of Congress imposes upon the circuit court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the Courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

"The Constitution declares that 'The Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments.' It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officer appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The Marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district in which the vacancy occurs is situated.

"But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in

the discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better that it should rest there, than that the country should be harrassed by the endless controversies to which a more specific direction on this subject might have given rise."

Ex parte Siebold, 100 U.S. 371, 397-98 (1880).

55/ Davidow, supra note 1, at 327, 328, 329, 333.

56/ Davidow, supra note 1, at 333.

57/ The common assumption that the states prosecute the vast majority of criminal cases in the United States is illustrated by the fact that "the Uniform Crime Reports give a nationwide view of crime based on police statistics contributed by state and local law enforcement agencies." U.S. Department of Justice, Uniform Crime Reports, v (1980). When the Uniform Crime Reports were begun approximately fifty years ago, only state and local authorities were used as a source of information, apparently because of this assumption about the low number of federal criminal prosecutions in relation to the number of state prosecutions. This assumption apparently still continues to operate. Phone conversation between Robert P. Davidow and John McBreen, Federal Bureau of Investigation, Washington, D.C., January 22, 1982. Although another document does report that in 1978, 972,000 criminal cases were prosecuted in the federal court - U.S. Department of Justice, Sourcebook of Criminal Justice Statistics 415 (1980) - there is no comparable figure for state courts; therefore, it is impossible accurately to compare the number of state and federal prosecutions. Phone conversation between Robert P. Davidow and Anthony Cain, Court Specialist, National Criminal Justice Reference Service, January 22, 1982.

58/ See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §955(a), 95 Stat. 357, 578 (1981).

58a/ C.f., Davidow, One Justice For All: A Proposal to Establish, by Federal Constitutional Amendment, a National System of Criminal Justice, 51 N.C. L. Rev. 259, 275 (1972) (use of law in the District of Columbia as a basis for experimentation to determine whether the law ought to be made applicable across the country).

58b/ Newman, Suing the Lawbreakers: Proposals to Strengthen the Section

1983 Damage Remedy for Law Enforcer's Misconduct, 87 Yale L.J. 447, 453-

454 (1978).

58/Id.

59/ Davidow, supra note 1, at 329, 338.

59a/ The following minimum damages have recently been proposed:

"Any deprivation of a constitutional right should be valued at not less than one thousand dollars; any time wrongfully spent in jail, no matter how brief, should be valued at not less than two thousand five hundred dollars."

Newman, Suing the Lawbreakers: Proposals to Strengthen the Section

1983 Damage Remedy for Law Enforcer's Misconduct, 87 Yale L. J. 447, 465 (1978).

60/ If we assume that a person works 50 weeks and 40 hours per week at the present minimum wage of \$3.35 an hour - 29 U.S.C.A. §206 (1978) - we find that the minimum amount recoverable would be \$100.50. Although this may seem like a small amount, it must be remembered that this is the minimum amount that may be recovered; one must also consider

that under the proposal the attorney would be provided at government expense; therefore the \$100.50 is not subject to any deduction for attorneys fees. It would obviously be possible to increase the percentage of the minimum wage if it were thought desirable to do so.

61/ "Basic to libertarian jurisprudence is acceptance of the reality that public sentiment is a factor to be considered." Gottlieb, Feedback From the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?, 67 Ky. L. J. 1008, 1017 (1978-79). Consider also the importance in the mind of the late Lon Fuller, of the reciprocal relationship between the government and the governed. See L. Fuller, The Morality of Law (rev. ed. 1969).

62/ See, e.g., S. 101, 97th Cong., 1st Sess. (1981).

63/ See, e.g., S. 751, 97th Cong., 1st Sess. (1981). Among the deficiencies of the bill, which would create a tort remedy against the United States, are the following: (1) It relates only to the fourth amendment (2) It provides no liability on the part of the individual law enforcement official.

(3) One convicted of an offense relating to the evidence unlawfully seized may not recover unless that person suffers actual physical personal injury or actual property damage.

(4) There is an absolute limitation on liability; the maximum recoverable is twenty-five thousand dollars. (5) Although there is a provision for disciplining the law enforcement officer, the agency that employs the officer is responsible for such discipline. (6) Private counsel is not appointed in the first instance; there is a provision for the recovery of actual costs on the part of a successful claimant, but this apparently is discretionary.

Similar deficiencies exist in Amend. No. 93 to S. 951, 97th Cong., 1st Sess. (1981). The main difference between S. 751 and this amendment to S. 951 appears to be that the latter provides for the creation of a "Search and Seizure Review Board," which is to determine whether a violation of the fourth amendment was conducted in good faith. (As is true of S. 751, the language is "good faith," rather than "reasonable good faith.") If the Board finds an absence of good faith, the Board is to recommend "appropriate disciplinary procedures to the agency which shall discipline the officer." (emphasis added)

For discussion of other bills that have

been recently introduced in the Congress, see Geller, Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives, 1975 Wash. U. L. Q. 621, 704-709 (1975).

64/ See, e.g., Kamisar, The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing," 62 Judicature 337, 343 (1979).

65/ "Thus the chief difficulty involved in an attempt to apply the ombudsman principle to the problem of police lawlessness in the United States today becomes clear: Some police administrators apparently do not share some of the values expressed in the Bill of Rights of the Federal Constitution. In this they seem to have the support of a substantial portion of the population."

Davidow, supra note 1, at 324 (footnote omitted).

66/ See generally, Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964).

67/ L. Fuller, The Morality of Law 96 (rev. ed. 1969).

68/ "As to the stigmatization associated with criminal conviction, the

real problem may not be the initial stigma but rather the continuing effects of that conviction. In this regard, a partial solution would seem to be the repeal of those laws that deprive convicted felons of many of their constitutional rights even after they have 'paid their debt to society.' Perpetual disenfranchisement of ex-felons is an example of such a law. Again, the analogy of the treatment of children may be appropriate. A young child may be 'punished' for having disobeyed his parents. Punishment may take the form of a lecture and perhaps even a spanking. The child, however, is not perpetually ostracized, but is made to see that although a wrong has been committed, he is still loved by, and a part of, the family. Similarly society could emphasize individual responsibility through stigmatization associated with criminal conviction while at the same time providing minimum deprivation of physical liberty and constitutional rights. Of course, to be fully effective such a scheme would also require a generally more forgiving societal attitude."

Davidow, Book Review, 52 Tex. L. Rev. 1245, 1252 (1974) (footnotes omitted).

69/ Unquestionably, given the right circumstances, people can be deterred. For example, while serving in Korea in the United States Army in the 1960s, I was told of how a Turkish unit in Korea solved the problem of thefts by members of the local population. Members of the Turkish unit caught a person attempting to steal items from their compound and the following day suspended the thief, by a spike driven through the thief's head, from the fence in front of the main gate of the compound. Thereafter, the Turkish unit was no longer bothered with the problem of theft, although other United Nations units in the area continued to be the objects of thievery. Obviously, the situation becomes considerably more complex when notions of due process come into play. For discussion of the concept of deterrence in the context of capital punishment, see, for example, Baldos and Cole, A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment, 85 Yale L. J. 170 (1975).

70/ Clearly other factors may influence the decision of an ex-convict

to adhere to the law, on the one hand, or to return to a life of crime, on the other hand. The availability of employment upon release from prison is an example of such a factor. In a recent speech, Chief Justice Burger, for example, acknowledged the importance of this factor. See Washington Post, December 17, 1981, at A12, col. 1.

- 71/ That there are differing views is hardly surprising in light of the well recognized phenomenon of selective perception. See Hastorf and Cantril, They Saw a Game: A Case Study, 49 J. Abnormal and Soc. Psych. 129, 133 (1954); Vidmar and Rokeach, Archie Bunker's Bigotry: A Study in Selective Perception and Exposure, 24 J. Com. 36 (1974).
- 72/ The concept of the "definition of the situation" was apparently developed by W. I. Thomas, and is discussed in R. Merton, Social Theory and Social Structure 475-77 (enlarged ed. 1968). The significance of this phrase for sociology is not only that it is a description of an individual's perception, but also that it often describes a false perception that constitutes a self-fulfilling prophecy. Merton refers to the example of a solvent bank in 1932 that became insolvent as a result of a perception on the part of depositors that it was not solvent. (This perception caused them to withdraw their funds from the bank, and this withdrawal resulted in insolvency.) Id. at 476.
- 73/ The Writ of Assistance was used by the British during the colonial period; such usage formed part of the background surrounding the ratification of the fourth amendment provision against unreasonable searches and seizures, which was first proposed in 1789. See 1 W. LaFare, Search and Seizure 4-5 (1978).
- More specifically, the Virginia Declaration of Rights, adopted by Virginia in 1776, and on which parts of the Bill of Rights were apparently modeled, provided in Clause 10:

"That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of the fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are

grievous and oppressive, and ought not to be granted."

Virginia Declaration of Rights, Section 10, as reproduced
in the George Mason Lectures (1976).

74/ For discussion of the original understanding of the concept of separation of powers, see The Federalist, No. 47 at 312 (bicentennial ed. 1976) (Madison).

75/ E.g.: "Most people do not understand freedom of speech as a generalizable principle; in failing to apply it in concrete situations, in tolerating restrictions on civil liberties, most people are revealing a failure of understanding rather than an attitude of hostility to civil liberties in general or to free speech in particular." Sarat, Studying American Legal Culture: An Assessment of Survey Evidence, 11 L. & Soc'y Rev. 427, 445 (1977).

Another study showing antipathy toward, and hence a possible misunderstanding of, some of the provisions of the Bill of Rights, is J. Casper, The Politics of Civil Liberties 1-2, 223-24 (1972).

76/ See note 28, *supra*.

76a/ "Maybe those of us who like Ombudsmanship have been a bit careless in presenting it as though we thought that the citizen - the customer, so to speak - is always right. Perhaps we have implied that the Ombudsman is always going to side with the citizen against officials. Of course, that isn't the way things have worked out in any degree. Wherever an Ombudsman has functioned, he has been purely and plainly an advocate of sound administration, not an advocate of the position of the complainant. In this respect, he has differed from many legislators who tend, when a constituent complains, to become an advocate of the complainant's case without much consideration of its merit; they pushed the matter because of the source from which it comes, not because of its worth. The Ombudsman, on the other hand, is not a built-in critic of officials, whether elected or not. He is simply stationed at the margin, as it were, between the citizen and the official, and he must be concerned with seeing that justice is done

to public servants as well as to the public whom they serve. Believe me, he does protect both groups. I have not the slightest doubt that if a free vote were taken among the police and other officials in any country in which the Ombudsman has functioned, a truly overwhelming majority of the participants in the election would favor the continuation of Ombudsmanship."

Gellhorn, The Ombudsman Concept in the United States, in Our Kind of Ombudsman 13-14 (L. Levison ed. 1970).

76b/ The phenomenon is illustrated by the pejorative use of such expressions as "ivory tower" and "academic question." Why this suspicion of academicians should have developed in the United States but not in England or in Western Europe is not entirely clear. Perhaps it is in part a reflection of the pioneer spirit of rugged individualism which encompassed the notion that every person was as competent in all things as any other person - a notion that manifested itself, for example, in the move toward popular election of judges, and the assumption that any qualified voter was competent to practice law. (For discussion of judicial selection during the Jacksonian era, see, for example, A. Ashman and J. Alfini, The Key to Judicial Merit Selection: The Nominating Process 9-10 (1974). From the middle of the 19th century to well into the 20th century, the constitution of the state of Indiana provided: "Every person of good moral character, being a voter, shall be entitled to admission to practice in all courts of justice." Ind. Const., art. 7, §21.) Perhaps such suspicion is also partly a reflection of free market economics. Anything that does not, or is not intended to, earn a profit is by definition suspicious. Since most academicians work for a fixed salary for an enterprise that does not have a profit motive, they are clearly not to be trusted.

77/ See, e.g., S. Schlesinger, Exclusionary Injustice 71-82 (1977).

Attachment.

APPENDIX

THE PROPOSED ACT OF CONGRESS*

A BILL

To create a criminal procedure ombudsman and to abrogate the exclusionary rule, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That this Act may be cited as the "Criminal Procedure Ombudsman Act of 1973."

SEC. 2. It is the sense of Congress, that since the exclusionary rule of criminal procedure (whereby evidence seized in violation of the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution has been inadmissible in both state and federal criminal trials) has failed to protect the innocent, has sometimes permitted guilty persons to escape punishment, and generally has failed to deter some police lawlessness, these evils ought to be reduced as far as practicable (and within constitutional limitations) primarily through the creation of a criminal procedure ombudsman, and secondarily through the abrogation of the exclusionary rule.

Section 2. It is the sense of Congress that since the Exclusionary Rule of Criminal Procedure (whereby ^{trustworthy} evidence seized in violation of the fourth, fifth, and sixth amendments to the United States Constitution has been inadmissible in federal criminal trials) has failed to protect the innocent, has sometimes permitted guilty persons to escape punishment, and generally has failed to deter some police lawlessness, these evils ought to be reduced as far as practicable (and within constitutional limitations) primarily through the creation of a criminal procedure ombudsman, and secondarily through the abrogation of the exclusionary rule.

SEC. 3. As used in this statute, the following words or phrases have the following meanings:

(a) *Law violation* means any violation of the Federal Constitution, state constitutions, federal laws, state laws, local ordinances, and regulations of any administrative body (local, state, or federal, and including the police).

Section 3(a). Law violation means any violation of the Federal Constitution, federal laws, and regulations of any federal administrative body, including federal law enforcement agencies.

* Modifications ^{of} the original (i.e., 1973) version are double-spaced and immediately follow the original sections that they replace.

(b) *Ombudsman* means *the* Ombudsman if spelled with a capital "O"; if spelled with a lower case "o," it refers to both the Ombudsman and assistant ombudsmen.

(c) *Public official* means any official or employee of the federal government, the states, or any political subdivision of the states, but does not include state and federal judges.

Section 3(c). Public official means any official or employee of the federal government, but does not include federal judges or federal magistrates.

SEC. 4. The Congress of the United States hereby establishes a Criminal Procedure Ombudsman (hereafter referred to as the Ombudsman).

SEC. 5. The Ombudsman shall be selected by the President of the United States from a list of three nominees submitted by a committee composed of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the House Minority Leader, and the Senate Minority Leader.

Section 5. The Ombudsman shall be selected by the unanimous vote of the justices of the United States Supreme Court.

SEC. 6. The Ombudsman shall serve a term of 15 years unless: (a) on the fifth or 10th anniversary of his selection, the Congress, by majority vote of the total membership of each House thereof, shall remove him, or (b) at any time the Congress, by a two-thirds vote of the total membership of each House, shall remove him because of disability or conviction of a felony or other crime involving moral turpitude.

Section 6. The Ombudsman shall serve a term of fifteen years unless:

- (a) on the fifth or tenth anniversary of his or her selection, the United States Supreme Court, by unanimous vote, shall remove him or her, or
- (b) at any time the Supreme Court, by a two-thirds vote, shall remove him or her because of disability or conviction of a felony or other crime involving moral turpitude.

SEC. 7. No person shall serve as Ombudsman unless he has reached his 35th birthday, has been admitted to the practice of law in at least one state or the District of Columbia, and has not been involved in partisan affairs for five years immediately preceding his selection.

SEC. 8. The salary of the Ombudsman shall equal that of the Chief Justice of the United States Supreme Court.

SEC. 9. The Ombudsman shall have the power:

(a) To receive complaints, oral or written, from anyone regarding the actions of public officials relating to any type of detention (regardless of duration and regardless of whether it occurs in connection with criminal or civil commitment proceedings), interrogation, interference with the attorney-client relationship, searches, or other invasions of privacy;

(b) to investigate the complaints referred to in (a) or, on his own initiative, to investigate the matters described in (a);

(c) in the course of investigations referred to in (b), to have access to the internal files of any public official, to take the depositions of pertinent witnesses, whose presence may be compelled by subpoena issued by the ombudsman (and enforceable in an appropriate federal district court), and to inspect the premises of public officials whose activities he may investigate;

(d) with respect to the matters described in (a), to make and publicize recommendations concerning that which the Ombudsman deems either (1) necessary to the avoidance of law violations, or (2) desirable, from a policy standpoint; however, publication shall occur only after any public officials whose actions are to be criticized are given an opportunity to respond to the criticisms, and the publication shall include the criticized officials' responses;

(e) to authorize payment of private counsel from appropriated funds for litigation, when the Ombudsman determines that there is probable cause to believe that an aggrieved person has a cause of action as described in section 12 of this statute;

(f) to appoint private counsel at government expense to sue in an appropriate federal district court for a declaratory judgment in those instances in which the Ombudsman decides that there is a need to determine whether there has been a law violation with respect to the matters described in subsection (a) and in which such determination has not been and is not likely to be made through litigation referred to in subsection (c);

(g) to appoint not more than 100 assistant ombudsmen who shall:

Section 9(g). ~~to~~ appoint not more than twelve assistant ombudsmen who shall:

- (1) Have all of the qualifications of the Ombudsman,
- (2) be paid the same salary as that received by judges of the United States District Courts,
- (3) exercise any of the powers of the Ombudsman which the Ombudsman, in his discretion, delegates to them (except that of delegation), and
- (4) serve for a term of 15 years unless removed by Congress in accordance with the provisions of section 6; and _____

Section 9 (g)(4), serve for a term of fifteen years unless removed by the United States Supreme Court in accordance with the provisions of Section 6; and

(h) to appoint such other staff members as may be necessary to effectuate this act.

SEC. 10. The Ombudsman may refuse to investigate a complaint if, on its face, it is obviously unmeritorious, or may require that a claimant of an apparently meritorious claim exhaust available administrative remedies, unless there is a danger of unreasonable delay or undue hardship. Following investigation of a facially meritorious claim, the Ombudsman may proceed no further if the facts found by him demonstrate that the claim is unmeritorious. The Ombudsman shall advise the claimant and the public official who is the object of the complaint of any action taken; the Ombudsman shall also advise the complainant of a decision to proceed no further and the reasons therefor.

SEC. 11. Subject to the limitations of section 9(d), the Ombudsman shall report annually to Congress regarding the work of his office.

SEC. 12. (a) Any person who is aggrieved because of a law violation by a public official may sue the offending official or officials (including a supervisory official where the supervisory official has materially contributed to the violation through willful misconduct or through negligence, including the failure to make or enforce reasonable regulations for the governance of the conduct of those working under him) in an appropriate United States District Court. Compensatory damages (not less than \$50 for each violation), exemplary damages (in cases of willful misconduct), and costs may be recovered by the aggrieved person.

Section 12(a). Any person who is aggrieved because of a law violation by a public official may sue the offending official or officials (including a supervisory official where the supervisory official has materially contributed to the violation through willful misconduct or through negligence including the failure to make or enforce reasonable regulations for the governance of the conduct of those working under him or her) in an appropriate United States District Court. Compensatory damages (not less than 1-1/2% of the annual gross income of someone working fifty weeks and earning the federal minimum wage, for each offense), exemplary damages (in cases of willful misconduct), and / ^{costs} may be recovered by the aggrieved person.

(b) In suits authorized under (a), if the fact finder (judge or jury) rules in favor of the defendant, the fact finder shall render a special verdict in which it shall indicate whether the basis of the verdict was (1) the absence of a law violation, (2) the inability of the fact finder to attribute blame to a specific defendant (despite a law violation), or (3) a reasonable, good faith effort on the part of the defendant to avoid a law violation.

(c) When the fact finder renders judgment for the defendant for reasons (2) or (3) set forth in subsection (b), the trial court shall render judgment against the United States for an amount determined according to the principles set forth in subsection (a).

(d) In suits under this section, the United States may intervene as a party defendant.

Section 12(d). In suits under this section, the United States may join as a party plaintiff.

(e) No judgment against an individual official under this section shall be satisfied, directly or indirectly, with public funds (local, state, or federal).

Section 12(e). No judgment against an individual official under this section shall be satisfied, directly or indirectly with public funds (federal, state, or local), nor shall such judgment be satisfied, directly or indirectly, through a system of individual or group insurance.

SEC. 13. No letter addressed to the ombudsman from any person whose mail might otherwise be subject to censorship shall be opened prior to delivery to the ombudsman.

SEC. 14. The Ombudsman shall have authority to seek injunctive relief in an appropriate federal district court against efforts by individuals to obstruct the activities of the ombudsman or his staff.

SEC. 15. No activities of the ombudsman and staff with respect to the functions of the ombudsman shall be reviewed in any court.

SEC. 16. The ombudsman shall enjoy the same immunities from civil and criminal liability as are enjoyed by federal judges.

SEC. 17. No evidence obtained through a law violation shall be inadmissible in any federal court if that evidence is obtained subsequent to three years after the effective date of this statute.

Section 17. No evidence obtained through a law violation shall be inadmissible in any federal court if that evidence is trustworthy and is obtained subsequent to three years after the effective date of this statute; however, this section shall be inoperative if Section 5 is declared invalid by the courts.

SEC. 18. It shall be the duty of every attorney involved in the trial (state or federal) of any case dealing with alleged criminal acts, civil commitment, or prison administration to report to the ombudsman every instance of apparent law violation by public officials.

Section 18. It shall be the duty of every attorney involved in a federal trial of any case dealing with alleged criminal acts, civil commitment, or prison administration to report to the ombudsman every instance of apparent law violation by public officials.

SEC. 19. If section 17 is declared unconstitutional, the remainder of this act shall remain in effect, it being the sense of Congress that, even without formal abolition of the exclusionary rule, the ombudsman may reduce the need for the employment of the exclusionary rule.

Section 19. If that portion of Section 17 that abrogates the exclusionary rule is declared unconstitutional, the remainder of this act shall remain in effect, it being the sense of Congress that, even without formal abolition of the exclusionary rule, the ombudsman may reduce the need for the employment of the exclusionary rule.

THE WINNER OF THE SECOND ANNUAL AJS ESSAY CONTEST



Henry Lueders Henderson was named the winner of the second annual AJS Essay Contest for his essay, "Justice in the eighties: the exclusionary rule and the principle of judicial integrity." Henderson, a third-year law student at Washington University School of Law, was presented with a \$1000 prize and membership in the Society at the AJS Midyear Meeting in Chicago, January 23.

Henderson, 29, has an A.B. in comparative religion from Kenyon College, a B.A./M.A. in theology from Trinity College, Oxford University, England, and an A.M. in theology from the University of Chicago. He is a native of Granite City, Illinois.

Judges for the essay contest were members of the Communications subcommittee of the AJS Programs Committee: William F. Ahlstrom, Vice President, Pharmaceutical Manufacturers Association, Washington, D.C.; Marshall R. Cassidy, an attorney from Tallahassee, Florida; Professor George F. Cole, Department of Political Science, University of Connecticut; and Norman Davis, Area Vice President, WPLG-TV, Miami, Florida. □

**Justice
in the eighties:
the exclusionary
rule and the
principle of
judicial integrity**

by Henry Lueders Henderson

The claim of allegiance that the law makes upon the citizen relies on the notion that the law itself serves the claims of justice and that the public can perceive the integrity of the judicial process. Current debate over the future of the exclusionary rule, which bars the introduction of evidence into trial if it was obtained in violation of the defendant's constitutional rights, demands the attention of those concerned with the future of justice in America and the principle of judicial integrity on which this future rests.

The exclusionary rule originated in a concern for judicial integrity. The critics of the rule ignore this, and advance their arguments solely on pragmatic grounds. This essay argues that only a transformation of the rule that recognizes its historical concern with judicial integrity can meet the pragmatic goals of the critics without sacrificing the claims of justice.

Pragmatism and judicial integrity

Human associations and institutions provide the context for justice. Their particular manifestations of justice in turn define the nature and virtue of those social arrangements. There is an essential reciprocity in the relation of society to justice.¹ Crime, in undermining the human relations that social life depends on, threatens in turn the existence of justice. Thus, the crime wave that has swept through American society since the early 1960s, has profound implications for the future of justice in this nation.²

The judicial system attempts to protect justice by providing a pragmatic and a principled

response to crime. The pragmatic response consists of particularized judgments on the specific crimes of specific individuals. The principled response is the development of public rules and concepts that give voice to general values and facilitates their application to specific acts.³

Critics contend that the courts have failed to deal effectively with crime and in fact contribute to it by formulating due process requirements that favor criminals and hamper law enforcement efforts.⁴ A central focus of such criticism is the exclusionary rule. A growing critical consensus calls for either the restriction or total elimination of the rule,⁵ almost exclusively for pragmatic reasons. The critics object to what the rule does (exclude highly probative evidence of guilt, allowing criminals to go free)⁶ and they object to what, in their opinion, it does not do (deter police illegality).⁷

In reducing the rule to pragmatic dimensions, critics ignore the original basis for the rule: the principle of judicial integrity, which demands that the courts be isolated from contagious contact with unconstitutional activity.⁸ A criticism that ignores this basis for the rule hampers the reformulation of the rule in a manner consistent with both the pragmatic and

3. See generally Dworkin, *TAKING RIGHTS SERIOUSLY*, 22-31, 81-90 (Cambridge, Mass.: Harvard University Press, 1977).

4. See, e.g., Wilson, *THINKING ABOUT CRIME* (New York: Basic Books, 1975); vanden Haag, *PUNISHING CRIMINALS* (New York: Basic Books, 1975); Kamisar, *On the Tactics of Police—Prosecution Oriented Critics of the Court*, 49 CORNELL L. Q. 436, (1964).

5. The consensus includes scholars, legislators, judges, and, since the national election of 1980, members of the executive branch. See, e.g., THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, RECOMMENDATION 40 (1981); Geller, *Is the Evidence In On the Exclusionary Rule?* 67 A.B.A.J. 1642 (1981). See generally LaFare, I SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, 1-39 (St. Paul, Minn.: West Publishing Co., 1978).

6. See, e.g., Stone v. Powell, 428 U.S. 465, 484 (1976).

7. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting).

8. "Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law..." *Olmstead v. U.S.*, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

1. See Arkes, *THE PHILOSOPHER IN THE CITY: THE MORAL DIMENSIONS OF URBAN POLITICS*, 3-20 (Princeton, N.J.: Princeton University Press, 1981). See also MacIntyre, *AFTER VIRTUE* 190-209 (Notre Dame, Ind.: University of Notre Dame Press, 1981).

2. Silberman, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE*, 3-26 (New York: Random House, 1978). See generally Remy et Voie, *VILLE, ORDRE ET VIOLENCE* (Paris: P.U.F., 1981). Radzinowicz and King, *THE GROWTH OF CRIME* (New York: Basic Books, 1977).

principled aspects of the rule and the judicial process itself. An examination of the historical development of the exclusionary rule will clarify the legal principles and pragmatic concerns involved and provide the context in which proposals to reform the rule can be best evaluated.

Evolution of the exclusionary rule

In the first clear⁹ articulation of the exclusionary rule, *Weeks v. United States*,¹⁰ the U.S. Supreme Court reviewed a conviction based on evidence obtained in two warrantless searches of the defendant's home. The Court focused on the fact that the evidence was obtained unconstitutionally, and overturned the conviction, holding that use of the illegal evidence was prejudicial error. The Court reasoned that to accept the evidence "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution."¹¹ The principle of judicial integrity¹² demanded that the Court not act as an accomplice to the violation of the Constitution.

The logical implications of the principle enunciated in *Weeks* were developed in *Silverthorne Lumber Co. v. United States*.¹³ At trial, the government used information acquired in an illegal search of the defendant's place of business to frame an indictment and to subpoena incriminating documents. In holding the use of the results of an illegal search unconstitutional, Justice Holmes, for the Court, wrote that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."¹⁴ The illegality at the root of the discovery attached to the uses of the discovery.

Development of the *Weeks* exclusionary principle culminated in the doctrine of the "Fruit of the Poisonous Tree," enunciated in *Nardone v. United States*.¹⁵ This doctrine holds that information acquired by unconstitutional means cannot be used to develop evidence admissible in a criminal prosecution because the taint of illegality attaches to evidence derived from an illegal source. The doctrine of the Fruit of the Poisonous Tree is the clearest conceptualization of the principle that judicial integrity requires the exclusionary rule lest courts become accomplices in the violation of the Constitution they are sworn to uphold.

One interpretation says judicial integrity requires the exclusionary rule lest the courts become accomplices in violating the Constitution.

Though the Court saw the exclusionary rule as mandated by principle and developed the rule according to the logic of principle, pragmatic considerations tempered its application and made it responsive to concrete circumstances. For instance, *Nardone* advanced a common-sense "Attenuation Doctrine" as a protection against ravages of overly rigorous logic.¹⁶ The doctrine states that strict causal analysis may prove a connection between certain evidence and a distant violation of the Fourth Amendment, but that the connection may "as a matter of good sense... have become so attenuated as to dissipate the taint."¹⁷ The admission of such attenuated evidence into court would not compromise judicial integrity. This is an example of what Ronald Dwor-

9. The first indication that exclusion of illegally obtained evidence was a proper reply to unconstitutional search and seizure was *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* focused on the fact that the evidence in question consisted of the defendant's private papers. The Court held that the Fourth and Fifth amendments joined to bar any compelled production of a defendant's private papers because of the sanctity of such material. This position was abandoned in subsequent search and seizure cases, and *Boyd* was not developed.

10. 232 U.S. 383 (1914).

11. *Id.* at 392.

12. The *Weeks* principle was first termed "judicial integrity" in *Elkins v. U.S.*, 361 U.S. 206 (1960).

13. 251 U.S. 387 (1919).

14. *Id.* at 392.

15. 308 U.S. 338 (1939). This was the second time *Nardone* was before the Supreme Court. *Nardone v. U.S.*, 302 U.S. 579 (1937) was the first.

16. 308 U.S., at 341. The attenuation doctrine was fully worked out in *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

17. 307 U.S. at 341.

kin has called a rule generated by principle and qualified by pragmatic policy.¹⁸

The language of the *Weeks*, *Silverthorne* and *Nardone* decisions strongly implied that the exclusionary rule was constitutionally required. As Justice Holmes wrote in *Silverthorne*, without the exclusionary rule, the Fourth Amendment becomes a mere form of words.¹⁹ However, the Court advanced the rule in terms of its supervisory power over the federal court system, and did not explicitly decide whether the rule was a necessary requirement of the Fourth Amendment.

The rule rejected

In *Wolf v. Colorado*,²⁰ the Supreme Court extended the Fourth Amendment to state proceedings via the Fourteenth Amendment. In so doing, it confronted squarely the issue of the constitutional status of the exclusionary rule and, over vigorous dissent, held that the Fourth Amendment did not require the rule.²¹ The majority characterized the rule as a "matter of judicial implication"²² and only one of many possible remedies to Fourth Amendment violations.

Although its central holding that the rule was not required by the Fourth Amendment was eventually reversed, *Wolf* introduced a notion that has dominated subsequent consideration of the exclusionary rule—the notion that the rule operates to deter police illegality.²³ The immediate impact of this notion was to strengthen the pragmatic rationale for implementing the rule.

18. Dworkin, *supra* n. 3, at 83.

19. 201 U.S. at 392.

20. 338 U.S. 25 (1949).

21. *Id.* at 32.

22. *Id.* at 28.

23. *Id.* at 31 and 44.

24. See, e.g., *Brinegar v. U.S.*, 338 U.S. 160, 181 (1949); *Rochin v. California*, 342 U.S. 165 (1952); *Irving v. People*, 347 U.S. 128 (1954).

25. 44 Cal.2d 434, 282 P.2d 905 (1955).

26. Traynor, *Mapp v. Ohio* at Large in the Fifty States, 1962 DUKE L. J. 319, 322 (1962).

27. 342 U.S. 165 (1952).

28. See LaFare, *supra* n. 5, at 12.

29. 367 U.S. 643 (1961).

30. *Id.* at 650-656.

31. *Id.* at 665-667.

32. *Id.* at 659.

33. *Id.* at 660.

34. See *Linkletter v. Walker*, 381 U.S. 618 (1965) (*Mapp* not applicable to pre-*Mapp* state court convictions because retroactive application would have no deterrent effect on police illegality).

Concern with police illegality was intense in the years following *Wolf*.²⁴ Justice Traynor, commenting on his opinion in *People v. Cahan*,²⁵ which adopted the exclusionary rule for California, emphasized the role of widespread police illegality as the motive for adopting the rule.²⁶ The notion that the rule could deter such illegality was a strong recommendation for adopting it. The U.S. Supreme Court itself, in *Rochin v. California*,²⁷ cut back on the *Wolf* holding in light of police practices that "shock the conscience," and it extended the rule to exclude evidence obtained by state violence against persons.²⁸

This process of cutting back on *Wolf* culminated in the landmark decision of *Mapp v. Ohio*,²⁹ (partially) overruling *Wolf* by holding the exclusionary rule applicable in all cases, state and federal. Pragmatic considerations certainly influenced the *Mapp* decision. The Court considered at length the experiences of the states (such as California) that had found the exclusionary rule the only effective means of deterring police misconduct. The desire to adopt an effective deterrent for these violations was clearly evident in the Court's decision to extend the exclusionary rule to the states.³⁰

The motivating factor in *Mapp*, however, was a concern for judicial integrity.³¹ With *Weeks* firmly in mind, the Court argued that to sanction violations of the Constitution by allowing fruits of such violations into court would force the judicial process to "disregard ... the charter of its own existence"³² and would destroy "that judicial integrity so necessary in the true administration of justice...."³³ Thus *Mapp* declared the exclusionary rule was compelled by constitutional principle and supported by pragmatism.

The eclipse of principle

While the notion that the rule could deter police misconduct gave strong support to extending the rule to the states, the Warren Court was reluctant to apply the rule where it would have absolutely no chance of deterring police misconduct.³⁴ The deterrent rationale thus functioned, much like the attenuation doctrine, to qualify the principled application of the rule with a pragmatic concern for the actual impact of the rule.

Critics of the rule depart radically from this

process of qualifying principle with pragmatism. In their writings the pragmatic concern with deterrence completely replaces the principle of judicial integrity as the basis of the rule. Their proposals share a common assumption that the sole justification for the rule is deterrence of police misconduct.³⁵ The groundwork for this understanding was laid by the Burger Court, which has spearheaded the attack on the rule.³⁶

The dissent of Chief Justice Burger in *Bivens v. Six Unknown Named Agents*³⁷ is a turning point in judicial attitude toward the exclusionary rule. In his dissent, the chief justice made it clear that he considered the rule to rest solely on a deterrence rationale. He insisted that this provided no justification at all for the rule, that there existed "no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."³⁸ He called for replacement of the rule with an effective deterrent that would not exclude evidence from trial and allow the guilty to escape punishment.³⁹

Subsequent opinions from the Burger Court repeat the assertion that the purpose of the rule is deterrence.⁴⁰ Justice Powell, writing for the Court in *United States v. Calandra*,⁴¹ concluded: "In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."⁴² The deterrence rationale of the rule thus overtook and eclipsed the principle of judicial integrity.

The proposals advanced by critics to restrict or eliminate the exclusionary rule fall into two categories: (1) proposals to restrict the rule by creating a "reasonable belief" exception; and (2) proposals to replace the rule with a tort remedy. A "reasonable belief" exception to the exclusionary rule would allow the fruits of an illegal search to be introduced into court if the officer who conducted the search reasonably believed that his action was legal.⁴³ The Fifth Circuit recently endorsed such an exception to the exclusionary rule when it ruled in *United States v. Williams*,⁴⁴ that evidence seized in conjunction with an unlawful arrest was admissible into court because the agent making the arrest acted in good faith with the reasonable (though mistaken) belief that he was authorized to make the arrest. The court reasoned against suppressing the evidence because it is not desir-

able to deter actions undertaken with a good faith belief that they are required by duty.⁴⁵

In January 1981, Senator Dennis DeConcini, introduced a bill, S.101,⁴⁶ to limit the effect of the exclusionary rule in federal courts along the lines of the "reasonable belief" exception. The bill would exclude illegally obtained evidence only when, as a matter of law, the violation of the Fourth Amendment was intentional or substantial. Determination of "substantiality" would turn on the recklessness of the violation and whether exclusion would tend to deter similar violations.⁴⁷ DeConcini also proposed an amendment to the Department of Justice appropriations bill, S.951,⁴⁸ that would enact the same "reasonable belief" exception to the exclusionary rule without the delay and discussion that committee hearings on S.101 would entail.

The *Final Report* of the Attorney General's Task Force on Violent Crime called for legislation restricting the exclusionary rule because "evidence obtained in the course of a reasonable, good faith search should not be excluded from criminal trials."⁴⁹

The second category of proposals seeks to eliminate the rule entirely and replace it with a tort remedy for damages from an illegal search and seizure. The dissent of Chief Justice Burger in *Bivens* suggested that a legislatively created tort remedy to Fourth Amendment violations would obviate the need for the exclusionary

35. S.101, 97th Cong., 1st Sess.; S.951, amend. 93, 97th Cong., 1st Sess.

36. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); *U.S. v. Calandra*, 414 U.S. 338 (1974); *U.S. v. Janis*, 428 U.S. 433 (1976); *Stone v. Powell*, 428 U.S. 465 (1976). See generally, Salzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 *GEORGETOWN L. J.* 151 (1980).

37. 403 U.S. 388, 411 (1971).

38. *Id.* at 416.

39. *Id.* at 421.

40. *U.S. v. Calandra*, 414 U.S. 338, 347, 354 (1975); *Stone v. Powell*, 428 U.S. 465, 486 (1976); *U.S. v. Janis*, 428 U.S. 433, 446 (1976); *U.S. v. Ceccolini*, 435 U.S. 268, 275 (1978); *Michigan v. DeFillippo*, 443 U.S. 31, 38 at n.3 (1979).

41. 414 U.S. 338 (1975).

42. *Id.* at 354.

43. See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

44. 622 F.2d 830 (1980).

45. *Id.* at 842.

46. S.101, 97th Cong., 1st Sess.

47. *Id.* at §3505 (b) (1) and (2).

48. S.951, amend. 93, 97th Cong., 1st Sess.

49. *Task Force, Final Report*, *supra* n. 5.

The "reasonable belief" exception to the exclusionary rule would reward ignorance of the Constitution.

rule.⁵⁰ The Chief Justice enthusiastically called for such legislation, and even provided an outline for a statute that would pass constitutional muster.⁵¹

In accord with this suggestion is the proposal of Senators Thurmond and Hatch, S.751.⁵² Their bill would eliminate the exclusionary rule as it applies to the Fourth Amendment⁵³ and would provide a tort remedy whereby the aggrieved party could receive damages from the U.S. government, plus attorney fees.⁵⁴ The individual law officer who conducted the illegal procedure would be liable to discipline by his agency.⁵⁵ Significantly, these remedies are all conditioned on the extent to which their application would tend to deter future viola-

tions of the Fourth Amendment.⁵⁶ There is no mention in this proposal, nor in the "reasonable belief" proposals, of the concern for judicial integrity.

Drawbacks to rule revisions

These proposals spring from important concerns about the effects of the exclusionary rule. Deterrence of police misconduct is unquestionably limited by the rule's indirect focus on the trial stage of a criminal prosecution rather than on the individual agent whose actions violated the Constitution. A tort remedy would strengthen deterrence. Also, the fact that some demonstrably guilty individuals do escape punishment by virtue of the exclusionary rule is an onerous consequence, both in terms of the effectiveness of the criminal justice system and the appearance of justice.⁵⁷ Preventing acquittal of the guilty is a valid concern of these proposals.

These proposals have very serious drawbacks, however. For instance, the "reasonable belief" exception rewards ignorance of the Constitution, undercutting the role of the judicial system as teacher of justice.⁵⁸ The exclusionary rule has served the interests of justice by motivating reform of the method and substance of police training, acquainting law enforcement agents more fully with the requirements of the Constitution they are supposed to protect.

More serious is the proposals' failure to provide for, and the critics' refusal to acknowledge, the principle of judicial integrity behind the exclusionary rule. This failure cuts at the very heart of the public law, which requires that legal discourse be attentive to neutral principles. Consider the seminal observations of Professor Wechsler on the necessity of principled adjudication:

I say that this type of *ad hoc* evaluation is, as it has always been, the deepest problem of our constitutionalism, not only with respect to judgments of the courts but also in the wider realm in which conflicting constitutional positions have played a part in our politics. . . . I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.⁵⁹

The opponents of the exclusionary rule, by forsaking the principle of judicial integrity, perform just the harm Professor Wechsler

50. 403 U.S. 388, 421 (1971).

51. *Id.* at 422, 423.

52. S.751, 97th Cong., 1st Sess.

53. *Id.* at §2692 (e).

54. *Id.* at §2695.

55. *Id.* at §2695.

56. *Id.* at §2692 (c) (b).

57. This is a major concern of the Task Force. See *Final Report*, Recommendation 10, *supra* n. 5.

58. Justice Brandeis wrote in *Olmsted v. United States*, 277 U.S. 438, 471 (1928): "Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example." If the Court allows mistaken ideas of the requirements of the Constitution to pass muster, it will teach ignorance of the Constitution. See Kamisar, *Is the exclusionary rule an "illogical" or "unnatural" interpretation of the Fourth Amendment?*, 62 JUDICATURE 83, 84 (1978).

59. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 12 (1959).

speaks of, supplanting principle with *ad hoc* proposals.

This essay suggested earlier that the corrosive effect of crime on human associations provided a major reason for concern with the future of the exclusionary rule, because opponents of the rule tout their proposals as steps to the elimination of crime. However, justice is not served by proposals that eschew principled discourse.⁶⁰ In fact, justice is itself a concept of human association governed by principles. The proposals to eliminate the exclusionary rule, by refusing to engage the principle of judicial integrity at the heart of the rule, constitute a threat to justice themselves. They bend the requirements of the law to policy considerations, and attempt to restrict public discussion of the law to pragmatic results. The interests of justice demand that future discussion of the exclusionary rule attend to the principle of judicial integrity.

A modest proposal

The critics of the rule advance two major objections to the rule: 1) that it allows demonstrably guilty criminals to go free because highly probative evidence of guilt is excluded from trial; 2) that it fails to effectively deter police misconduct.⁶¹ To eliminate these problems the critics are willing to deny the demands of judicial integrity. But judicial integrity must not be sacrificed, and, indeed, need not be sacrificed to meet the critics' concerns.

The criticism that the rule does not deter police misconduct can be satisfied by adopting a tort remedy by which victims of police illegality could act directly against the officials and agencies that violate their constitutional rights. This would greatly supplement the deterrent effect of the exclusionary rule by increasing the cost of misconduct for the perpetrator. It would also give a statutory remedy to victims of illegal searches in which no evidence of crime is turned up and who now have very little recourse against their tormentors.⁶²

The most serious criticism of the exclusionary rule is that it allows many criminals to escape conviction and punishment.⁶³ Though there is little evidence to support this contention,⁶⁴ it is a valid concern, because the perception that criminals escape punishment encourages crime and undermines the legitimacy of the judicial system by creating the appearance

of injustice.⁶⁵ Examination of the threshold requirements for successfully invoking the exclusionary rule, and of the type of cases where such motions are usually made suggests a way to reformulate the rule to significantly reduce the number of successful suppression motions without sacrificing judicial integrity.

To raise a successful objection to the introduction of evidence at trial, the defendant must demonstrate a reasonable expectation of privacy in the object seized or in the area searched.⁶⁶ To do this, he must show that the public recognizes the validity of his expectation. Objects and places in which there is no such public

60. See White, *The Fourth Amendment As A Way of Talking About People*, 1974 S. Ct. Rev. 165 (1974).

61. See pages 357-359.

62. See Oaks, *Studying the Exclusionary Rule in Search and Seizure* 37 U. Chi. L. Rev. 665, 709 (1970): "the exclusionary rule will not affect police practices where the police have no desire to arrest." See also Foote, *Tort Remedies For Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

63. See Geller, *supra* n. 5, at 1644. He writes that this criticism is premised on "at least two factual assumptions: (1) that the motions to suppress evidence of those charged with serious violent offenses are often granted; and (2) that the granting of a suppression motion results in the release of the defendant." In testimony before the Senate Subcommittee on Criminal Law of the Committee on the Judiciary of the Senate, Assistant Attorney General D. Lowell Jensen voiced these two concerns, but said that even if the assumptions are not valid, any time even one obviously guilty person escapes punishment through exclusionary rule technicalities the price is too high and requires a major revision of the rule. Jensen, *Statement Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, On the Fourth Amendment Exclusionary Rule*, October 5, 1981, n. 2, at 10.

64. See Comptroller General of the United States, *THE IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS*, Rep. No. GGD-79-45 (April 19, 1979) reporting findings of a survey of 38 U.S. Attorneys' Offices between July 1 and August 31, 1978. Nearly 3,000 cases were examined during this period. The report found that only 1.3 per cent of the cases had evidence suppressed because of Fourth Amendment violations and that only 0.1 per cent of the cases that were screened by the offices were screened because of Fourth Amendment complications. Further, more than half of the defendants who had successful motions to suppress were convicted anyway. Similar data indicating the negligible impact of the exclusionary rule in terms of freeing defendants appear in other studies. See Frost, Lucianovic, and Cox, *WHAT HAPPENS AFTER ARREST?* (Washington, D.C.: Institute for Law and Social Research, August, 1977) (In studying screening patterns in Washington, D.C., the study showed that less than one per cent of all arrests were refused because of due process problems such as unlawful search and seizure.) See also Brosi, *A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING* (Washington, D.C.: Institute for Law and Social Research, April, 1979).

65. *U.S. v. Payner*, 447 U.S. 727, 734 (1980); *Stone v. Powell*, 428 U.S. 465, 490-491 (1976).

66. *Rakas v. Illinois*, 439 U.S. 128 148 (1978).

recognition are not protected by the Fourth Amendment, and thus not subject to the exclusionary rule.

The vast majority of successful motions to suppress evidence under the exclusionary rule involve possessory offenses (e.g., stolen property, drugs, illegal weapons).⁶⁷ These involve objects in which, by definition, the defendant cannot demonstrate a reasonable expectation of privacy. The motions turn not upon the legal status of the objects seized, but upon the place in which they were found and the legality of the search that turned them up.⁶⁸ Thus, the seizure is analyzed entirely in terms of the attendant search. This is in accord with the doctrine of the Fruit of the Poisonous Tree as currently applied.

However, there is no logical necessity for identifying seizure with search. A search can be conducted without any resulting seizure; a seizure is a further action beyond and distinct from a search. As a distinct action, it can be evaluated separately.

The concern linking search and seizure at present is twofold: 1) to prevent an illegal search from going unremedied, and 2) to prevent the courts from being contaminated by accepting evidence seized in violation of the Fourth Amendment. In the first instance, treating the search via the seizure is clumsy and indirect. An effective tort remedy directly addressing the illegal search would eliminate the need for treating the seizure as a surrogate search.

In regard to the second concern, seizure can be reasonable or unreasonable under the Fourth

Amendment. The Fourth Amendment does not protect illegally held objects, such as heroin or sawed-off shotguns. Only if the defendant can demonstrate a Fourth Amendment interest in the object seized should it be proper to analyze whether the seizure of the object offended the Amendment; only then should the doctrine of the Fruit of the Poisonous Tree come into the analysis. Without a demonstrable privacy right in the object, the defendant should have no right to invoke this doctrine, proper only to Fourth Amendment guarantees.

Instead of beginning and ending analysis with the search, as it is currently done, analysis should begin with the seizure, and progress to the search only when a Fourth Amendment right is at issue. If the defendant has no Fourth Amendment right to the object seized in the first place, he would receive no Fourth Amendment protection against its seizure.⁶⁹

Such a reformulation of the applicability of the exclusionary rule would meet the concerns of the critics without offending judicial integrity. A more direct and effective deterrent to police misconduct would be created. In addition, a significant percentage of suppression motions under the exclusionary rule would be eliminated with the removal of possessory offenses from the lineup of cases where suppression can be obtained.

Most importantly, judicial integrity would not be compromised by the adoption of this proposal. Unlike the proposals for a "reasonable belief" exception or the total elimination of the rule, no objects seized in violation of the Constitution would be admitted into trial, and the courts would not become accomplices to the violation of their own charter. The important constitutional doctrine of the Fruit of the Poisonous Tree would continue to protect the Fourth Amendment interests of citizens, and prevent introduction of illegally seized evidence into it.

The change contemplated would open the courts to highly probative evidence of crime. This would increase conviction rates, and work to eliminate the impression that criminals escape punishment by operation of law, which creates the appearance of injustice in the public's mind.

Justice would be served by greater deterrence of police misconduct, a higher conviction rate, and the maintenance of judicial integrity. □

67. In a study of D.C., Cobb County, Salt Lake, Los Angeles, and New Orleans prosecution patterns, it was found that "only one homicide arrest was rejected for due process reasons, and no rapes were rejected for these reasons. Most of the due process related rejections were concentrated in drug cases, as might be expected, because drug offenses are possessory crimes and due process violations usually relate to search and seizure." See Brosi, *supra* n. 64. In the 1977 INSLAW study of Washington, D.C. prosecution patterns, it was found that 77 per cent of the cases screened because of due process problems were victimless crimes, primarily involving narcotics. See Frost et al., *supra* n. 64. See generally Comptroller General of the United States, *supra* n. 64.

68. See, e.g., *Steagald v. U.S.*, ___ U.S. ___, 101 S. Ct. 1642 (1981).

69. This recalls in part the analysis of search and seizure suggested in *Boyd v. United States*, *supra* n. 9, which began its discussion of the seizure in question by considering the nature of the object seized.



OFFICE OF THE PUBLIC DEFENDER
C2200 Government Center
Minneapolis, Minnesota 55487
(612) 348-7530



William R. Kennedy, Chief Public Defender

September 17, 1981

The Honorable David Durenberger
United States Senate
353 Russell Senate Building
Washington, D.C. 20510

RE: S.F. 101

Dear Senator Durenberger:

I am the current Chairman of the Minnesota State Bar Association Criminal Law Section. Last year that Section unanimously opposed S.F. 101, which attempts to repeal the exclusionary rule of Mapp v. Ohio. The vote of the Section, included both prosecution and defense attorneys.

At the State Bar Convention in Duluth, the General Assembly voted to endorse the Criminal Law Section's recommendation on Friday, June 26, 1981. Thus, in effect, the Minnesota State Bar Association has taken a public stand of opposition to S.F. 101.

Both the Criminal Law Section and the General Assembly felt that File 101 was so vague as to be open to abuse by police officials. Moreover, they felt the current exclusionary rule provided adequate remedies for violation of Fourth Amendment rights which were not present in S.F. 101. Lastly, all parties were in agreement that it was bad precedent to amend Supreme Court decisions through the legislative process.

I would appreciate your conveying the stand of Minnesota Bar Association and its Criminal Law Section, to the Senate Judiciary Committee, at your earliest possible convenience.

If you have any questions, please write or call.

Sincerely,

David P. Murrin
Chairman
Criminal Law Section
Minnesota Bar Association

-vm

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Comments on S. 2304 and S. 2231 by the National Association of Criminal
Defense Lawyers

THE GOOD FAITH EXCEPTION

Both in its testimony before the Judiciary Criminal Law Subcommittee and in its answer to written questions propounded by that Subcommittee, the NACDL has addressed various aspects of the "Good Faith Exception" proposals. The Association objects to the proposed good faith exceptions to the Exclusionary Rule as being unworkable, irrational and unfair. Additionally, they are prima facie unconstitutional. S.2304 and S.2231, although not specifically commented upon in our earlier testimony, are subject to the same criticisms as the good faith exception measures which are considered by the Subcommittee.

First of all, such attempts to abrogate the reach of the Exclusionary Rule will have at best a negligible effect on conviction rates. It is well established by the G.A.O. survey referred to in our earlier testimony that motions to suppress evidence based on violations of the Fourth Amendment are granted in only 1.3% of the time. More than 2,800 cases were studied. The common plaint that the guilty go free because the constable blunders is simply not statistically true! The effect of the Exclusionary Rule on conviction rates is practically non-existent as the rule is presently interpreted. Proponents of Exclusionary Rule elimination who claim that elimination of the rule (or its substantial abrogation) will improve the nation's ability to wage war on crime ignore the bare and obvious facts. It will have no effect whatsoever in this respect.

What the good faith exception will do is create a double standard of justice in the United States, one standard for the populace at large and one for law enforcement agents. The most notable achievement of our two hundred years of history has been a single Constitution and set of laws applicable to both the government and the people. The good faith exception undermines this basic principle. The good faith of a police

officer is by its very nature subjective and can only be established by investigation into the thought processes of the officer whose motivation is in question. Throughout the history of anglo-american jurisprudence, the courts have steadfastly refused to make decisions based upon such subjective representations. The judicial system's preference for objective evidence is grounded in sound public policy, i.e., that subjective states of mind cannot be reliably ascertained. As pointed out in NACDL's testimony before this Subcommittee, logic and symmetry would require that if the police are allowed to assert the defense of good faith and/or ignorance of the law, then also should the citizen be able to assert these defenses. There is no such provision in either of these bills. Indeed, any such proposal would be viewed as ludicrous, as should the good faith standard for application of the Exclusionary Rule.

Adoption of the good faith exception would swallow the Exclusionary Rule. There is a wide-spread hostility by judges towards enforcement of the rule. This assertion is supported by the infinitesimal number of motions to suppress which are granted. The use of a subjective test provides no criteria by which the decisions of a trial judge may be effectively evaluated by an appellate court. The sole requirement for satisfying the good faith exception is the officer's testimony that he thought he was doing the right thing. The good faith exceptions will place a premium on ignorance as knowledgeable defalcation would defeat the officer's purpose. In the words of Mr. Justice Stewart,

"...if subjective good faith alone was the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police."
Beck v. Ohio, 379 U.S. 89, 97 (1964).

The good faith exceptions embodied in these bills and similar pending legislation are tawdry invitations to tarnish, demean and debase a criminal justice system which, as the embodiment of the American promise, is the envy of those who would bring individual liberty to their own lands. These bills represent a definitive retreat from the basic

concept that the government is bound by laws and must justify its behavior to its constituents in courts of law. The effect on the criminal justice system would be such that any further concern for the appearance of fairness and justice would not only be useless, it would be hypocritical.

Even without the manifold negative effects of the good faith exception to the Exclusionary Rule, it fails constitutional muster. The good faith exception would completely vitiate the reasonableness requirement of the Fourth Amendment itself. It is perfectly foreseeable that a court could find a search to be unreasonable but at the same time admit the fruits of the search into evidence by virtue of the good faith of the searchers. While the bills are obviously designed to impair the Exclusionary Rule, they in fact impair the basic concept and language of the Constitution itself. Further, the Exclusionary Rule is itself an integral part of the Fourth Amendment and is therefore beyond legislative impairment short of a constitutional amendment.

A GRAVE MISCARRIAGE OF JUSTICE

The additional exception found in S.2304 founders on many of the same shoals as the good faith exception. It lacks specificity and fails to articulate any objective standard for the admission of evidence. The litigation which would be spawned by the words "grave miscarriage of justice" would be unending. Such an exception fails to state any sort of standard which could be used either by the trial court or the appellate court. Total discretion is placed with the trial court to admit evidence based on the court's concept of what constitutes a grave miscarriage of justice. For some, a grave miscarriage of justice would be any accused who was not convicted. For others, a suppression of evidence by virtue of the misconduct of an officer might be a miscarriage of justice in a drug case, but not in a murder case or vice versa. Such a state of affairs is repugnant to the concept of a society of laws, not of men. It is tantamount to repeal of the Exclusionary Rule and is therefore also repugnant to the Constitution.

QUESTIONS AND ANSWERS

 RESPONSES OF JUDGE MALCOLM R. WILKEY

QUESTION

ABOLITION OF THE EXCLUSIONARY RULE AS A CURE FOR THE CONFUSION IN FOURTH AMENDMENT LAW

IN HIS TESTIMONY, FRANK CARRINGTON ARGUED THAT SEARCH AND SEIZURE LAW IS SO CONFUSING THAT THE POLICE CANNOT BE EXPECTED TO BE DETERRED BY THE EXCLUSIONARY RULE. HOW WILL ABOLITION OF THE RULE ALLEVIATE THE CONFUSION IN FOURTH AMENDMENT JURISPRUDENCE? IF WE ARE SERIOUS ABOUT DETERRING POLICE MISCONDUCT, WON'T WE STILL HAVE TO MAKE THE REQUIREMENTS OF THE FOURTH AMENDMENT UNDERSTANDABLE TO THE OFFICER ON THE STREET REGARDLESS OF THE REMEDY WE CHOOSE TO ENFORCE THE PROVISIONS OF THAT AMENDMENT? WHAT CAN CONGRESS DO TO HELP CLARIFY THE SCOPE AND MEANING OF THE LAW OF SEARCH AND SEIZURE? CAN IT PROMULGATE RULES OF PROCEDURE FOR FEDERAL LAW ENFORCEMENT OFFICERS? CAN IT STATUTORILY ELABORATE UPON THE MEANING OF REASONABLENESS? PROBABLE CAUSE? WHAT SUGGESTIONS, IN ANY, DO YOU HAVE IN THIS REGARD?

ANSWER

I.

Frank Carrington is quite correct that search and seizure law is so confusing that the police cannot be expected to be deterred by the exclusionary rule.

No policeman's conduct can be deterred, no human being's actions can be influenced, by a rule of law which is either unknown to him, so confused as to be not understandable by him, or changed after the conduct referred to. A fine example of why the confusion in Fourth Amendment law, with all of its refined technicalities, makes it impossible for honest policemen to be influenced by it even if they want to is United States v. Ross, 655 F.2d 1159 (1981), cert. granted, 102 S. Ct. 386 (1981).

Detective Cassidy opened the trunk of Ross' car and discovered a brown paper bag and a leather satchel. He opened them -- 17 months after the Supreme Court decided United States v. Chadwick, 433 U.S. 1 (1977), and many months before the Supreme Court decided Arkansas v. Sanders, 442 U.S. 753 (1979). At the time when Detective Cassidy was called upon

to take the action that he did, judges and other learned scholars had been discussing for many months the meaning of the Supreme Court's decision in Chadwick and considering what would be the rule in the type case which eventually came about in Sanders and in Ross. The best informed commentary had concluded that in view of Chadwick it was no longer possible to predict how the Supreme Court would treat the matter. Professor Wayne LaFave, in his well-known treatise published at about the time Detective Cassidy opened Ross' trunk, summarized the situation as follows: "It is impossible to predict how the Court would decide [a case like Sanders], for the reasoning in Chadwick and the Court's car-search cases does not all point in a single direction." 2 W. LAFAVE, Search and Seizure § 7.2, at 538-39 (1978).

If the answer to the legal questioning governing Detective Cassidy's conduct was unknown to Professor LaFave, it was at least equally unknown to Cassidy. Furthermore, if Detective Cassidy, when he confronted Ross' paper bag and leather pouch, had been accompanied by a visiting "advisory committee" composed of Circuit Judges Friendly, Mansfield, and Meskill of the Second Circuit (based on the Second Circuit's case of United States v. Ochs, 595 F.2d 1247, 1254-55 (2d Cir.), cert. denied, 444 U.S. 955 (1979)), two of the three judges would have told him that he did not need a warrant to open the containers he had found. Yet, when Ross' case came to trial, after the Supreme Court decided Sanders, the majority of the D.C. Circuit charged Detective Cassidy with the knowledge that he did need a warrant to satisfy the Constitution.

If the Supreme Court ultimately reverses the D.C. Circuit (Ross is undecided after argument as of 16 April 1982), Cassidy may be proved right and the majority of the D.C. Circuit wrong. Should we put some of my colleagues out on foot patrol and elevate Cassidy to the bench? Or should we say that the law is so fouled up in the area of search and seizure that there is no longer any such thing as legal judgment?

This is just one example, but the situation is repeated many, many times over. If the judges and the academicians cannot tell what the law should be in a given fact situation, how in the world can we charge ordinary policemen with knowing this? And if the policemen can't know it, how can they possibly be deterred from illegal conduct -- as subsequently determined?

II.

The reverse relationship must be examined. Search and seizure law is so confusing, so technical, with so many fine lines of distinction precisely because we have an exclusionary rule of evidence. If the fate of the defendant were not to be determined by the ruling on search and seizure of tangible evidence, as in nearly every case it is, then the trial judges -- and the Supreme Court itself -- would not be required to lay down the law with the fine niceties that they have. There would not be the squirming around by trial judges to find some minor distinction in order to prevent an obviously guilty defendant from going free, nor later would there be the necessary repair work by the Supreme Court to keep intact reasonable rules of search and seizure under the Fourth Amendment. The exclusionary rule distorts and corrupts the standards which we ought to have to govern search and seizure under the Fourth Amendment.

Once the rule is abolished, the courts can devote themselves to laying down simple broad rules which will be effective guides to the police and effective protection for all citizens.

That is the answer to the question "How will abolition of the rule alleviate the confusion in Fourth Amendment jurisprudence?"

III.

Of course we will always have to make requirements of the Fourth Amendment understandable to the officer on the street regardless of the remedy we choose to enforce the protections of that amendment. As stated above, both the courts and Congress can make Fourth Amendment law more understandable to -- and enforceable by -- the officer on the street once the distorting effect of the exclusionary rule is eliminated.

IV.

What can Congress do to help clarify the scope and meaning of the law of search and seizure? It can do a lot.

What is the constitutional guaranty which we seek to preserve and enforce here? That guaranty is "the right of the people to be secure . . . against unreasonable searches and seizures." What makes a search unreasonable is the absence of sufficient probable cause to justify the search. Therefore, the level of probable cause required determines the permissible conduct of the police.

I make no effort to cite literally hundreds of cases in which the standard of probable cause required by the courts, particularly the appellate courts, was so unreasonable as to appear absurd, silly, and fatuous to laymen and lawyers alike. Nor do I cite other hundreds of cases, usually at the trial level, in which the judge declined to enforce a level of probable cause which many would feel called for, simply because he did not want to see an obviously guilty felon set free because of an insubstantial violation by the police.

The definition of "unreasonable searches and seizures," and, of course, "probable cause," is nowhere found in the Constitution. It has been a matter for the courts to decide, but it could be a matter for Congress. One of the most sensible formulations was made by former Solicitor General Erwin Griswold, in stating his rule of thumb on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good, careful, and conscientious police officer to do under the circumstances, then he should be supported." Erwin N. Griswold, Search and Seizure: A Dilemma of the Supreme Court 57-58 (1975).

Dean Griswold did not assert, and neither do I, that this would be sufficient for a judicial standard, but it surely is not beyond the realm of possibility for Congress to define a standard of reasonable search and seizure, i.e., the level of probable cause required, in terms which would meet more commonsense standards than what we find in many appellate decisions. Such a definition by Congress of what is a reasonable and an unreasonable search and seizure might be buttressed in the legislative history by a recital of some representative cases which have required absurd levels of probable cause which no longer could be considered as governing precedent in light of the new statutory standard. In determining such a statutory standard of "reasonableness," which is always Congress' prerogative, Congress might look at our own experience and mores as well as the standards of probable cause for search and seizure used in other civilized nations with cultures similar to our own.

"It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). It is equally apparent that Congress may, in the first instance, describe for purposes of law enforcement such things as what may give rise to "probable cause" and when a warrant may be

dispensed with. See 18 U.S.C. § 2518(7) authorizing warrantless wiretaps in specific circumstances. Statutory characterizations of constitutional provisions will be subject to judicial review, of course, to assure harmony with the judicial understanding of the constitutional requirement, but a prior legislative determination might appropriately inform the content of such opened-ended language as "unreasonable" and "probable cause." Cf. Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978) : (probable cause to conduct an administrative search may be based on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment).

This review of the standard of reasonableness, i.e., the requisite level of probable cause, should not be made, if at all, until after we have abolished the exclusionary rule and gained some experience with alternative methods of protecting the privacy of individuals and controlling the police. What is "reasonable" is always a function of past experience applied to present time, place, and circumstances. We need to see how the police operate under a new dispensation and how the courts construe "probable cause" without the overhanging distortion of the exclusionary rule threatening to free undeniably guilty criminals. Only then can we evaluate the standard of reasonableness and probable cause.

QUESTION

THE VIABILITY OF JUDICIAL INTEGRITY RATIONALE

IN ITS TESTIMONY, THE DEPARTMENT OF JUSTICE STATES THAT "OVER TIME, AS THE RULE HAS BEEN EXPLICATED, IT HAS BECOME CLEAR THAT THE RATIONALE FOR THE RULE IS DETERRENCE, AND THE ASSERTED RATIONALE OF JUDICIAL INTEGRITY HAS BEEN ESSENTIALLY ABANDONED." JUSTICE BRENNAN TAKES A DIFFERENT VIEW. IN HIS DISSENT IN CALANDRA BRENNAN NOTED THAT:

"UPPERMOST IN THE MINDS OF THE FRAMERS OF THE (EXCLUSIONARY) RULE WAS NOT THE RULE'S POSSIBLE DETERRENT EFFECT, BUT THE TWIN GOALS OF ENABLING THE JUDICIARY TO AVOID THE TAINT OF PARTNERSHIP IN OFFICIAL LAWLESSNESS AND OF ASSURING THE PEOPLE (THAT) THE GOVERNMENT WOULD NOT PROFIT FROM ITS

LAWLESS BEHAVIOR, THUS MINIMIZING THE RISK OF
SERIOUSLY UNDERMINING POPULAR TRUST IN GOVERNMENT."

WHAT ARE YOUR THOUGHTS ABOUT THE IMPORTANCE OF THE ALTERNATIVE BASIS
FOR DETERRENCE OF "JUDICIAL INTEGRITY?"

IF ONE OF THE OBJECTIVES OF THE EXCLUSIONARY RULE IS TO PROTECT
THE INTEGRITY OF THE JUDICIAL PROCESS FROM OFFICIAL LAWLESSNESS,
THEN WHY NOT EXCLUDE EVIDENCE UNLAWFULLY OBTAINED BY PRIVATE PARTIES?
EVEN THOUGH THE FOURTH AMENDMENT MAY NOT PROHIBIT UNLAWFUL SEARCHES
BY PRIVATE PARTIES, IF IT IS MEANT TO PREVENT THE COURTS FROM BECOMING
PARTNERS IN AN UNLAWFUL ACT, EXCLUSION WOULD SEEM TO BE JUSTIFIED
HERE TO. PLEASE RESPOND.

IF ONE OF THE OBJECTIVES OF THE RULE IS "JUDICIAL INTEG-
RITY" WHY HAS THE COURT DEVELOPED RULES OF STANDING TO PRECLUDE
CERTAIN INDIVIDUALS FROM INVOKING THE RULE. (FOR EXAMPLE, THE
COURT HAS INDICATED THAT A PERSON CANNOT INVOKE THE RULE IF HIS
GOOD ARE SEIZED DURING THE COURSE OF A SEARCH OF ANOTHER'S PREMISES.)
PLEASE COMMENT.

ANSWER

I.

I agree that if one of the current objectives of the exclusionary
rule is to protect the integrity of the judicial process, then evidence
unlawfully obtained by private parties logically should be excluded --
but, of course, it is not and never has been. The reason that evidence
unlawfully obtained by private parties is not excluded is because today
the only rationale of the rule is deterrence, hence it makes no sense
to cause the government to forfeit a case in court by excluding the
evidence, when there is no reasonable expectation that the actions
of private parties would be "deterred." We all should recognize that
the theory of deterrence as applied to excluding evidence offered by
the prosecutor, because some policeman over whom the prosecutor had
absolutely no control whatsoever made a mistake previously, is itself
tenuous in the extreme. Applying the exclusionary rule to the actions
of private parties is obviously so much more tenuous that it has not
been done.

I would make a similar comment in regard to the rules of standing

developed by the Supreme Court which preclude certain individuals from invoking the exclusionary rule. In those situations the Court recognizes that deterrence is so farfetched that it refuses to grant standing to the parties to claim protection of the rule.

II.

Let me examine another area about which you did not inquire, but which illustrates -- even better than do the standing and private action limitations -- that "judicial integrity" cannot be relied upon as a valid rationale for the exclusionary rule.

The rationale of judicial integrity is totally contradicted by our courts' unquestioned willingness to try defendants who themselves have been illegally seized and brought before them. In five cases, stretching over a period of 100 years, the Supreme Court has adhered to the rule that it matters not how the prosecution obtained the presence of the accused in court, he will be tried.

In Ker v. Illinois, 119 U.S. 436 (1886), a defendant kidnapped in Peru was brought by force to Illinois for trial; in Mahon v. Justice, 127 U.S. 700 (1888), the accused was forcibly abducted from West Virginia for trial in Kentucky; in Frisbie v. Collins, 342 U.S. 519 (1952), the defendant was forcibly seized in Illinois for trial in Michigan; in Gerstein v. Pugh, 420 U.S. 103, 119 (1975), there was insufficient probable cause for the arrest and prosecution by information; and in U.S. v. Crews, 445 U.S. 463, 477, 478 (1980), the accused's original detention was likewise without probable cause. In all cases the Supreme Court squarely stated that, whatever means were used to produce the accused for trial, a conviction would not upset.

In Frisbie Justice Black, who has some credentials as a civil libertarian, wrote for the Court:

This court has never departed from the rule announced in Ker v. Illinois . . . that the power of the court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." 342 U.S. at 522.

Compare the above by a unanimous Supreme Court with the laconic observation of an English judge in regard to the admissibility of material evidence almost a century earlier: "It matters not how you get it; if you steal it, it will still be admissible in evidence." Crompton, J., in Regina v. Leatham [1861], 8 Cox C.C. 498 at 501. Later

in Frisbie Justice Black noted: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." 342 U.S. at 522.

In all five Supreme Court decisions, stretching from 1886 through 1980, not a single Justice dissented from the rule as stated by Justice Black. Why should there be an exclusionary rule for illegally seized material evidence when there is no such exclusionary rule for illegally seized people? It makes no sense to argue that the admission of illegally seized evidence violates "judicial integrity" and demeans our system of justice when the judiciary's trial of an illegally seized person carries no such stigma.

III.

Not only does the practice of the courts in these various situations demonstrate that judicial integrity is not the prevailing rationale, but it is clear that this rationale is deeply and inherently flawed. The Subcommittee's question cites Justice Brennan's fear that allowing the Government to use illegally seized evidence would create a "risk of seriously undermining popular trust in government." Yet isn't this the precise result that follows when the exclusionary rule is applied? Is there anything that more seriously undermines popular trust in Government than when courts free an obviously guilty murderer or rapist on a ground completely unrelated to his guilt?

The same flaw exists in the argument that police officers will not respect the law if they see the courts permitting the use of illegally obtained evidence. If the law's legitimacy is our concern, isn't it apparent that someone who has committed a serious crime, and whose guilt is obvious to everyone including the trial judge, will never respect and obey a legal system which refuses to punish him in spite of his guilt? If utilizing the evidence would soil the judiciary with "the taint of partnership in official lawlessness," as Justice Brennan asserts, does not freeing an obviously guilty criminal also make the criminal justice system an abettor of private lawlessness?

What this points out is that the judicial integrity rationale put forth by exclusionary rule proponents represents a distorted and one-sided perspective of the entire situation. The rule's destructive impact on the courts' respectability and the law's legitimacy must not be ignored. Indeed, in my view any serious look at the "popular mistrust" of the Government in relation to the criminal justice system inevitably highlights the failure of the exclusionary rule.

IV.

Efforts to resurrect other rationales, long since discarded by the Supreme Court, are a very revealing admission by even the rule's most ardent supporters that deterrence has not been demonstrated by seventy years of experience, and suggest a sneaking suspicion that deterrence is impossible to prove. While from Weeks (1914) to Mapp (1961) the rule was justified as protecting the privacy of the individual, the Supreme Court later downgraded this rationale:

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored.' Reparation comes too late. Linkletter v. Walker, 381 U.S. 618, 637 (1965)."
U.S. v. Calandra, 414 U.S. 338, 347 (1974).

And while Justice Clark in Mapp did refer to "that judicial integrity so necessary in the true administration of justice" (367 U.S. at 660), four years later he wrote for the court unequivocally:

"... all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."
Linkletter v. Walker, 381 U.S. 618, 636-7 (1965).

More recently Justice Powell for the Court reaffirmed this: "The rule's prime purpose is to deter future unlawful police conduct."
U.S. v. Calandra, 414 U.S. 338, 374 (1974).

So it won't do for supporters of the rule to scurry back to the original but discarded rationales of privacy and judicial integrity as the effectiveness of deterrence is shown to be unproved and unprovable. And the unequivocal refutation to the rules' supporters above comes not from the rules' critics but from the Supreme Court itself.

QUESTIONRELEVANT AND RELIABLE EVIDENCE

IT HAS BEEN ARGUED THAT THE EXCLUSIONARY RULE INTERFERES WITH THE REAL PURPOSE OF CRIMINAL TRIALS--THE ASCERTAINMENT OF TRUTH--SINCE IT RESULTS IN THE SUPPRESSION OF RELEVANT AND RELIABLE EVIDENCE. ISN'T IT TRUE THAT OTHER EXAMPLES EXIST IN OUR LEGAL SYSTEM WHERE "RELIABLE AND RELEVANT" EVIDENCE IS NOT ADMITTED? FOR EXAMPLE, THERE ARE A NUMBER OF RECOGNIZED PRIVILEGES WHICH RESULT IN THE NON-ADMISSIBILITY OF EVIDENCE, SUCH AS THE RELATIONSHIPS BETWEEN A DOCTOR AND PATIENT AND PENITENT AND PRIEST. DO YOU THINK THAT THE POLICY GROUNDS SUPPORTING THESE PRIVILEGES ARE MORE IMPORTANT THAN THE CONSTITUTIONAL AND POLICY GROUNDS IMPLICATED BY THE FOURTH AMENDMENT?

ANSWER

Certainly it is true that evidentiary privileges work to exclude reliable and relevant evidence. But a careful analysis of the purposes behind these privileges reveals that the "rationale" underlying the exclusionary rule is not even superficially analogous.

The overriding policy underlying the basic evidentiary privileges is the preservation of confidentiality. Many of the privileges exist to preserve confidential interpersonal relationships -- for example, husband-wife, lawyer-client, doctor-patient. The other privileges are aimed at preventing the release of information, for various and obvious policy reasons. Thus we have privileges for the identity of a police informer, for the political votes cast by a person, for trade secrets, and for state secrets and other official information.

In each of these cases, the legal system makes the rational evaluation that the preservation of confidentiality is of greater public interest than the availability of the evidence thereby excluded. The crucial fact about making this determination in any of these situations is that there is no alternative. If the evidence or testimony is required in open court, the underlying confidentiality interest vanishes. Thus there is a stark choice between disclosure or a privilege. What-

ever the decision there will be a gain and a cost, and we can hope only that we can achieve a net benefit.

The case of the exclusionary rule is exactly the opposite. If the evidence is admitted the Fourth Amendment interest at stake is not inherently and irretrievably forsaken. Alternatives do exist. The police officer may be disciplined, and the victim of the illegal search may recover damages. Moreover, when we recognize an evidentiary privilege, the benefit gained is clear and tangible: the confidential information is protected. But with the exclusionary rule we are asked to put our faith behind the assumption that if we throw out enough solid evidence and let enough guilty criminals go free, we ultimately will achieve a greater protection of Fourth Amendment rights. The dubious nature of this reasoning, when combined with a recognition of the available alternatives for directly vindicating the Fourth Amendment interests at stake, makes clear that we are throwing away important and irrefutable evidence for no good reason.

Note that the values lost by the exclusionary rule are disproportionately large compared to the values lost by invoking other privileges. The rule excluding the most critical material evidence nearly always results in the acquittal of an obviously guilty accused. The testimony of a spouse excluded by the husband-wife privilege may range in importance from the decisive to the trivial. The same can be said of the other testimonial privileges. The cost of the exclusionary rule is uniformly high.

When the purposes of the various evidentiary privileges and the exclusionary rule are thus compared, it becomes apparent that the analogy suggested by the Subcommittee's question is not an apt one. Opposing the exclusionary rule does not mean implying that the policy grounds underlying the evidentiary privileges are more important than the constitutional and policy grounds implicated by the Fourth Amendment. Rather, opposing the exclusionary rule means recognizing the lesson to be drawn from an analysis of the evidentiary privileges: reliable and relevant evidence should not be discarded lightly, and in any event only if there are no alternatives by which we can promote the policy interest at stake while retaining the availability

of the evidence for use in court. The exclusionary rule fails this test completely.

QUESTION

SCOPE OF CONGRESSIONAL AUTHORITY

OBVIOUSLY, ONE OF THE MOST FUNDAMENTAL QUESTIONS BEFORE THIS SUBCOMMITTEE IS THE SCOPE OF CONGRESSIONAL AUTHORITY, IF ANY, TO MODIFY OR ABOLISH THE EXCLUSIONARY RULE BY STATUTE. I WOULD LIKE BOTH OF YOU TO PROVIDE THE SUBCOMMITTEE WITH YOUR THOUGHTS ON THIS ISSUE AND IN DOING SO TO RESPOND TO EACH OF THE FOLLOWING ARGUMENTS THAT HAVE BEEN MADE BEFORE THIS SUBCOMMITTEE:

-- THE EXCLUSIONARY RULE IS A JUDGE-MADE RULE OF EVIDENCE THAT CONGRESS CAN NEGATE. CONGRESS HAS ALREADY TAKEN ACTION TO OFFSET A CRIMINAL PROCEDURE DECISION BY THE SUPREME COURT. IN 1968, CONGRESS ENACTED A PROVISION DESIGNED TO OFFSET THE SUPREME COURT'S DECISION IN MIRANDA V. ARIZONA.

-- WHILE IT WAS ONCE POSSIBLE TO ARGUE THAT THE EXCLUSIONARY RULE WAS AN EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWER OVER THE LOWER FEDERAL COURTS, THAT ARGUMENT LOST ITS FORCE AFTER MAPP V. OHIO APPLIED THE RULE TO THE STATES. THE SUPREME COURT'S SUPERVISORY POWER DOES NOT EXTEND TO THE STATES. THUS, AS JUSTICE CLARK WROTE IN MAPP, THE RULE IS "A CLEAR, SPECIFIC AND CONSTITUTIONALLY REQUIRED -- EVEN IF JUDICIALLY IMPLIED -- DETERRENT SAFEGUARD . . . WITHOUT WHICH THE FOURTH AMENDMENT WOULD BE REDUCED TO A FORM OF WORDS."

CONSTITUTIONAL AUTHORITY

--CONGRESS AT LEAST HAS THE CONSTITUTIONAL POWER TO ADOPT A GOOD FAITH EXCEPTION TO THE RULE. THREE POINTS ARE MADE TO SUPPORT THIS ARGUMENT:

1. THE SOLE OR PRIMARY BASIS FOR THE RULE IS DETERRENCE;
2. IT IS NOT POSSIBLE TO DETER ACTIONS TAKEN IN THE GOOD FAITH BELIEF THAT THEY ARE CONSTITUTIONAL; AND

3. THEREFORE, CONGRESS CAN LIMIT THE RULE TO THOSE CIRCUMSTANCES WHERE THE DETERRENCE RATIONALE APPLIES --
NON-GOOD FAITH VIOLATIONS.

ANSWER

I.

I agree that the "exclusionary rule is a judge-made rule of evidence that Congress can negate." I say I agree, because many Justices of the Supreme Court have said that, and I follow them.

Let us note at the outset that in contrast to many other issues which the subcommittee is addressing and on which witnesses have spoken very freely, the question of congressional authority is not a policy question on which we all are free to express views and the Congress is entirely free to make a choice. While it is the duty of the committee to assay the constitutional question involved, we all must recognize that the ultimate answer on constitutionality is in the hands of the High Court. Therefore, what the other witnesses and I tell this subcommittee should not be an expression of our own personal preferences, but should be an honest appraisal of where the Justices of the Supreme Court stand.

The exclusionary rule is not a rule required by the Constitution. No Supreme Court has ever held that it was. As Justice Black once said,

The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.

Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (concurring opinion).

It is clear from the way the rule originated in United States v. Weeks (1914) that the Court was simply choosing a method of enforcement of the Fourth Amendment. In his memoirs Justice Douglas confirmed this, saying that at the time the Court confronted the choice of three possible methods, that it chose the exclusionary rule, and he believed chose correctly.

If one goes through the search and seizure opinion of the Supreme Court for the last 20 years, one finds a reiteration by one Justice after another that this is a method of enforcing the constitutional protection, not necessarily the precise method commanded by the

Constitution, but one chosen by the High Court. One can find this in the opinions by Chief Justice Burger, and Justices Stewart, White, Blackman, Powell and Rehnquist. The very manner in which they have spoken of the rule and its rationale of deterrence show that they regard it as a chosen method, a method about which they are having increasing doubts.

It is significant that in the two long articles Professor Yale Kamisar wrote in 62 Judicature 66 and 337 (1978-79), he nowhere claimed that the Fourth Amendment necessarily mandated the exclusionary rule to the exclusion of any other remedy. He argued only that, under the Constitution, we have a choice of methods to enforce the ban against unreasonable search and seizure and that the exclusionary rule is the best choice. Also, in the very last sentence of his prepared testimony before the Senate subcommittee on 25 March 1982 Professor Kamisar stated: "Indeed, it is not inconceivable that the availability of a vastly improved civil remedy would lead the Supreme Court on its own to repeal, or at least curtail, the exclusionary rule." Obviously, if the Supreme Court is free to repeal the exclusionary rule -- which I certainly think it is -- then the exclusionary rule is not constitutionally required. It is only the remedy chosen by the Supreme Court, and other methods, if reasonably believed to be effective and equally or better suited in enforcing the Fourth Amendment, could be adopted. The Constitution prohibits unreasonable searches and seizures, it may mandate a remedy to enforce that prohibition, but nowhere does the Constitution mandate the exclusion of all other possible remedies.

Implementing constitutional provisions is by no means reserved to the judiciary; in fact, it is usually only when the legislative branch is seen to have failed in implementing a constitutional provision that the judiciary feels compelled to take action.

II.

The attempt to deduce a constitutional requirement from the language in Mapp, with reference to the supervisory power, etc., is a red herring and a complete confusion of the meaning of Mapp.

Mapp did not pretend to rest on the exercise of the Supreme Court's supervisory power, because while the Supreme Court does have

that power over the lower federal courts, it certainly doesn't have it over the states. Mapp was the last case which relied on protecting the privacy of the individual as a rationale for the exclusionary rule, and it was this privacy rationale that justified applying the rule to the states. Justice Clark very plainly stated: "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the due-process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government." 367 U.S. at 655.

I read this language, and that quoted in the committee's question, simply to say that the states are constitutionally obligated to protect the right of privacy just as is the federal government, and that the exclusionary rule, if it is reasonable in the federal system, is equally reasonable as the method of enforcing the Fourth (Fourteenth) Amendment in the states. This and nothing more. The quotation in the committee's question adds nothing to the argument that the rule itself, as distinguished from some method of implementing the Fourth Amendment, is constitutionally required.

This last statement is clear when we recall that it was precisely in Mapp that Justice Black, whose fifth vote was necessary to the decision, said in his concurrence: "The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence and I am extremely doubtful that such provision could properly be inferred from nothing more than the basic demand against unreasonable searches and seizures." 367 U.S. at 661-62. The result reached in Mapp thus must rest, not only on Justice Clark's opinion, but also on Justice Black's opinion. It is thus impossible to argue that the exclusionary rule is now constitutionally mandated by Mapp, no matter how Clark's opinion is interpreted.

III.

It is significant that the Supreme Court did rely on the privacy rationale in Mapp (1960), because chronologically this is an anomaly. Remember that in Linkletter four years later Justice Clark was to write that ". . . all of the cases since Wolf [1949] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." 381 U.S. at 636-37 (1965). Beginning in Wolf (1949) the High Court

had abandoned the privacy rationale in favor of deterrence, but in Mapp (1961) it went back to the privacy rationale to apply the exclusionary rule to the states. There may have been a serious question about imposing the rule based on the ground of deterrence only, but the Court felt more comfortable with the rationale of privacy on the theory that the Fourteenth Amendment embraced the Fourth which covered privacy. This done in 1961, the Court was never again to cite privacy as the rationale for the exclusionary rule.

IV.

Let me emphasize again that the answer to this question on the constitutional scope of congressional authority is an answer calling for the witnesses' best judgment on what the Supreme Court has said on this matter over the years, and is not an answer in which we are free to express our "druthers." The origin of the exclusionary rule, the fact that the Supreme Court has never said that the rule itself is constitutionally mandated, and the various pronouncements of the individual Justices over the period of the last 20 years make it very clear to me that the exclusionary rule is neither of constitutional nor divine origin. Someday the Supreme Court is going to speak on this precise question, and when it does, I hope this committee will go back and look at what the different witnesses advised it on this particular question.

Again, the fact that some supporters of the rule are desperately casting about for other rationales, e.g., an exclusive constitutional mandate, other than the one cited by the High Court itself, i.e., deterrence, to sustain the rule reveals that the rule's supporters are, with deterrence as the theme, in a rapidly sinking boat and know it.

V.

In regard to the good faith exception to the exclusionary rule, the three points made to support the Congress' constitutional power have considerable rationality. Congress, in my judgment, would have the power to adopt not only the good-faith exception but a good many other alternate measures if it so desires. However, as I made clear in my testimony, I do not as a matter of policy favor the good-faith rule.

RESPONSES OF LOUIS F. LINDEN, EXECUTIVE DIRECTOR
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
ON BEHALF OF GERARD F. TREANOR

QUESTION

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NON-GOOD FAITH VIOLATIONS.

ANSWER

The first argument presented is misleading in its simplicity. The Fourth Amendment Exclusionary Rule manifests itself in at least two different contexts, not just the evidentiary setting. The Exclusionary Rule is also a rule of procedure. Both of these sets of rules have a common characteristic, the sources of the rules. There exist three sources for both sets of rules: the Constitution, the common law, and legislation. Some rules are entirely of one source, while others are the result of the interplay between more than one source. An example of the latter is the relationship between the Sixth Amendment right to confrontation and the hearsay rule.

The hearsay rule has been developed in anglo-american jurisprudence for nearly four hundred years and has been adopted as a matter of policy based on common sense. Virtually independent of this historical basis, the Sixth Amendment rights to confrontation bolsters the rule and places limitations on the exceptions to the rule. Were the rule simply a product of the common law, Congress could certainly reform it in whatever way it wished. However, because the hearsay rule is founded in both the common law and the Sixth Amendment, and in light of the well accepted fact that Congress can pass no law violating the Constitution, the Sixth Amendment defines the parameters of any legislation dealing with the hearsay rule.

It is a basic tenet of our federal structure that the construction of the Constitution is the task and duty of the federal courts and, ultimately, the Supreme Court. It is further a basic rule that the Court's interpretation of the organic document may be overridden only by amendment of the Constitution itself. The question of Congressional authority to eliminate or limit the Fourth Amendment Exclusionary Rule is a question of separation of powers between the legislative and judicial branches. As Chief Justice Marshall wrote in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803),

"It is emphatically the province and duty of the Judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

It cannot be disputed that the Congress may override an interpretation of its legislation by subsequent legislation. However, to allow such a modification of a constitutional interpretation would, in the words of the first Chief Justice, "... subvert the very foundation of all written constitutions."

The Fourth Amendment Exclusionary Rule is an interpretation of the Fourth Amendment and, as such, cannot be separated from the bare text of the Amendment itself. The fact that it is not specifically set out does not diminish its importance or impact. The Exclusionary Rule is therefore protected from congressional abrogation. To find otherwise is to make the Constitution a dead and useless thing incapable of effectuating its purpose, like a wagon deprived of its horses. The fallacy of the first argument presented lies in ignoring the difference between rules based on judicial experience and policy, and those which are interpretations of the Constitution.

To eliminate or otherwise legislatively modify the Fourth Amendment Exclusionary Rule would create the anomalous situation of having two different Constitutions, one applying to the federal government and one to the states. In addition to the separation of powers problem, the applicability of the Rule to the states adds dimensions of comity and federalism to the confusion. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961) was unequivocal on the nature of the restriction on the state.

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (emphasis added) 367 U.S. at 655

The Court held that the Exclusionary Rule was an essential part of the Fourth and the Fourteenth Amendment and was thereby binding on the states. The legislation presently pending before Congress speaks only to the exercise of the rule in the federal courts. Assuming arguendo that such legislation might be valid, the states are still bound by the dictates of Mapp and the cases following it. Should the Congress adopt legislation to relieve the states of the requirements of the Fourth Amendment, it would be acting as a super-legislature for the states be

defining the acceptable limits of their rules of evidence and procedure, thereby usurping the role of the Constitution.

The good faith exception does not provide the easy way out. While good faith may be very appealing in its own right, it ignores the basic language of the Fourth Amendment which prohibits unreasonable searches and seizures. The essence of this constitutional standard is that of objectivity. Every search and/or seizure must be judged according to whether it is reasonable. The good faith exception would make reasonableness irrelevant, as a search could be found to be simultaneously unreasonable and in good faith.

The enactment of a good faith exception by its logic should also require a good faith exception for criminal defendants. If law enforcement agents are allowed to contravene the law in good faith, can it be said that the country's citizens deserve less? The basis of the continual rejection of this defense to criminal culpability remains valid for those sworn to enforce the law. To enact a good faith exception solely for law enforcement officers would once again create two sets of laws, one for those who exercise official power and one for everyone else. Such a rule could not stand constitutional muster, especially if considered in light of criminal civil rights statutes. Would good faith also apply to criminal charges against an officer for violation of the civil rights of a criminal defendant? A negative answer results in a contradiction. For example, an officer could believe in good faith that he had the right to pump a suspect's stomach and if the court so found, the resulting evidence would be admissible. If the same officer was subsequently charged with a criminal civil rights violation arising from the same conduct, he would not be protected by the good faith exception and could be convicted. The court would then have admitted evidence obtained by a criminal act. If the good faith exception applied in both contexts, there would seem to be a denial of equal protection. A police defendant could plead good faith to participation in a criminal civil rights violation while the civilian would not have the benefit.

In addition to the internal contradictions, there also remains the federalism problem mentioned supra. Once again, there would be one constitution for the states and one for the federal government.

QUESTIONCONFUSION BETWEEN THE EXCLUSIONARY RULE AND CONTENT OF SUBSTANTIVE FOURTH AMENDMENT LAW

PROFESSOR YALE KAMISAR HAS ARGUED THAT MUCH OF THE CRITICISM AGAINST THE EXCLUSIONARY RULE IS MISDIRECTED. HE CONTENTS THAT THESE CRITICISMS ARE REALLY DIRECTED AT THE CONTENT OF SUBSTANTIVE FOURTH AMENDMENT LAW AND NOT AT RULE ITSELF. IN THIS REGARD HE CITES THE STATEMENT OF FORMER SENATOR ROBERT WAGNER AT THE 1938 NEW YORK STATE CONSTITUTIONAL CONVENTION:

"ALL THE ARGUMENTS (THAT THE EXCLUSIONARY RULE WILL HANDICAP LAW ENFORCEMENT) SEEM TO ME TO BE PROPERLY DIRECTED NOT AGAINST THE EXCLUSIONARY RULE BUT AGAINST THE SUBSTANTIVE GUARANTEE ITSELF. ... IT IS THE (LAW OF SEARCH AND SEIZURE), NOT THE SANCTION, WHICH IMPOSES LIMITS ON THE OPERATION OF THE POLICE. IF THE RULE IS OBEYED AS IT SHOULD BE, AND AS WE DECLARE IT SHOULD BE, THERE WILL BE NO ILLEGALLY OBTAINED EVIDENCE TO BE EXCLUDED BY THE OPERATION OF THE SANCTION."

DO YOU BELIEVE THAT IT WOULD BE MORE BENEFICIAL FOR US TO CRITIQUE THE COURT'S SUBSTANTIVE FOURTH AMENDMENT DECISIONS RATHER THAN FOCUSING SO MUCH ATTENTION ON THE RULE ITSELF?

ANSWER

A searching analysis of the Supreme Court's Fourth Amendment decision and a statistical analysis of the actual effects of the sanction's imposition or nonimposition would give the Subcommittee a truer picture of the state of affairs in this area. The bills presently pending before the Subcommittee are based upon rather dubious assumptions. In fact, the Subcommittee will find that the Supreme Court and the inferior federal courts do not set hoardes of criminals loose to prey upon society. The statistics cited in the Association's previous testimony (see Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Gen. Acct. Off. GGD-79-45, 1979) are witness to the facts, and the Courts' decisions would provide great insight as to the process by which this result was obtained. In short, it would invoke the old maxim, "If it ain't broke, don't fix it!"

QUESTIONGOOD FAITH AND PREMIUM ON IGNORANCE

IN ITS COMMENTARY ACCOMPANYING ITS DRAFT BILL, THE DEPARTMENT OF JUSTICE APPEARS TO RESPOND TO THOSE WHO CLAIM THAT THE GOOD FAITH EXCEPTION WILL PROMOTE IGNORANCE ON THE PART OF THE OFFICERS. SPECIFICALLY, THE DEPARTMENT STATES:

"OUR PROPOSAL WILL STILL ENCOURAGE AND REQUIRE LAW ENFORCEMENT OFFICERS TO KEEP ABREAST OF THE COMPLEX LAW OF SEARCH AND SEIZURE BECAUSE THE CONDUCT OF AN OFFICER WILL HAVE TO BE INFORMED TO BE REASONABLE."

ARE YOU SATISFIED BY THIS STATEMENT? OR DO YOU BELIEVE THAT THE GOOD FAITH EXCEPTION WILL ENCOURAGE OFFICERS TO REMAIN UNINFORMED?

ANSWER

American jurisprudential history is rife with instances of abuse of power that was virtually unchecked until the advent of the Exclusionary Rule. The Rule provided a rational motive for obeying the law and a correlative sanction for those who did not. It ignores human experience to expect the same results after the sanctions are removed.

How does a court decide the definition of informed? Does it mean that the officer read about the law or knew what the law was? Is it enough to read it and later "forget" it? Given that from the officer's point of view, a successful conclusion to the case might hang in the balance, is it realistic to expect him to admit to knowing and understanding the law and violating it inspite of his knowledge? It is more likely that he will say that he "forgot" or "misunderstood" and that he really didn't want to break the law. As mentioned earlier, we have denied this form of defense to those accused of crimes and for very good policy reasons. Those reasons are no less valid for law enforcers than for the rest of the citizenry. We cannot realistically expect more from law enforcement personnel than we expect from ourselves.

QUESTIONPROFESSOR KAPLAN'S CRITICISM OF GOOD FAITH

ANOTHER CRITICISM OF THE GOOD FAITH EXCEPTION HAS BEEN RAISED BY STANFORD LAW PROFESSOR JOHN KAPLAN, A STRONG OPPONENT OF THE RULE, AS STATED BY PROFESSOR KAPLAN:

"IT IS DIFFICULT ENOUGH TO ADMINISTER THE CURRENT EXCLUSIONARY RULE, SINCE POLICE PERJURY CAN, AND OFTEN DOES, PREVENT ACCURATE FINDINGS OF FACT. SO LONG AS LOWER COURT TRIAL JUDGES REMAIN OPPOSED ON PRINCIPLE TO THE SANCTION THEY ARE SUPPOSED TO BE ENFORCING, THE ADDITION OF ANOTHER ESPECIALLY SUBJECTIVE FACTUAL DETERMINATION WILL CONSTITUTE ALMOST AN OPEN INVITATION TO NULLIFICATION AT THE TRIAL COURT LEVEL. IN ORDER TO SUPPRESS EVIDENCE, THE TRIAL JUDGE WOULD HAVE TO FIND EVIDENCE OF THE OFFICER'S STATE OF MIND WHICH WOULD BE GENERALLY DIFFICULT TO COME BY APART FROM THE OFFICER'S SELF-SERVING AND GENERALLY UNCONTRADICTED TESTIMONY."

PLEASE COMMENT.

ANSWER

The perception of virtually every man and woman who tries criminal cases in the courts of this land as a defense advocate is well set out by Professor Kaplan. Judges are widely perceived as being hostile to the Exclusionary Rule. Many, perhaps a majority, of judges are perceived as being drawn from the ranks of the prosecution and being unduly sympathetic to the prosecution. Statistics which show that all but a very few motions to suppress on Fourth Amendment grounds are denied would seem to support this contention. Given the subjective (and inevitably self-serving) nature of the officer's testimony regarding his own state of mind, the result is foreordained.

QUESTIONOBJECTIONS TO THE EXCLUSIONARY RULE

THE EXCLUSIONARY RULE HAS BEEN ATTACKED AS IRRATIONAL FOR A NUMBER OF REASONS, INCLUDING:

- (1) THE RULE ONLY WORKS TO THE BENEFIT OF THOSE WHO HAVE

COMMITTED CRIMINAL ACTS; IT IS OF NO BENEFIT TO THE INNOCENT VICTIMS OF SEARCHES; AND

(2) THE RULE APPLIES REGARDLESS OF EITHER THE GRAVITY OF THE OFFENSE CHARGED OR THE DEGREE OF OFFICIAL MISCONDUCT.

PLEASE RESPOND TO THESE CONTENTIONS.

ANSWER

(1) Insofar as the Rule deters unreasonable searches and seizures, it benefits all who live within our borders. As a nation and as individuals, we all have a stake in the integrity of the criminal justice system. Innocent victims of searches have a remedy under Bivens v. Six Unknown Named Agents, 403 U.S. 388, 81 S.Ct. 1999, 29 L.Ed 2d 619 (1971) which holds that federal courts are empowered to award money damages for violations of civil rights by a federal officer. However, if Congress is truly interested in vindicating the rights of the innocent subjects of unreasonable searches or seizures, there is certainly no bar to enacting a more formidable remedy in addition to the Fourth Amendment Exclusionary Rule.

(2) Currently, law officers and judges alike are stating once again the desirability of predictability and consistency in Fourth Amendment law. In its present state, the law is criticized by law enforcement for being convoluted and reaching contradictory results. To include the gravity of the offense and/or the "degree of official misconduct" would hopelessly confuse and unnecessarily complicate the calculus. Officers are now heard to complain that the law is too complex and voluminous to be understood or, for that matter, remembered. The addition of these two considerations would simply add to more variables.

The heart of the judicial system is the making of decisions. In making decisions, the decision maker must decide what factors will be included as being relevant. Neither the gravity of the offense or the "degree of official misconduct" have relevance to the reasonableness of the search or seizure in question. It is therefore quite rational, indeed it is required, that these irrelevant factors not be considered.

QUESTIONEFFECT OF THE EXCLUSIONARY RULE

IN ITS STATEMENT TO THE TASK FORCE IN SUPPORT OF THE EXCLUSIONARY RULE, THE ABA DECLARED:

"(THAT) TO SAY THAT THE FEDERAL EXCLUSIONARY RULE HAS NOT WORKED IS TO IGNORE EXPERIENCE. IT HAS CONTRIBUTED TO SUBSTANTIAL LAW REFORM BY FEDERAL AUTHORITIES. IT HAS INCREASED THE PROFESSIONALISM OF FEDERAL LAW ENFORCEMENT OFFICERS. IT HAS VASTLY ENHANCED THE INTEGRITY OF THE FEDERAL JUDICIAL PROCESS."

AS ONE WHO HAS SEEN THE RULE IN ACTION IN ~~BOTH STATE AND~~ FEDERAL COURTS WILL YOU PLEASE COMMENT ON THIS STATEMENT.

ANSWER

The statistical history of the Exclusionary Rule demonstrates that the number of suppression motions granted declines with experience. This would seem to indicate that once the Rule is applied, it motivates law enforcement agents to learn and observe the law. Observance of the law encourages the use of more reliable permissible methods of investigation and results in tighter better developed cases. The new Canadian Constitution includes an exclusionary rule similar to that of the Fourth Amendment. It was adopted specifically in reaction to the effects of the rule in Wray Case. The rule in that case allowed the introduction of evidence regardless of the circumstances under which it was obtained. Gross and frequent abuse of citizens' rights was the result of that rule and the Canadians have clearly observed that the removal of such restrictions has a deleterious effect. Even the much-vaunted Royal Canadian Mounted Police were found to have perpetrated intentional violations of the rights of citizens in order to obtain evidence. The lesson to be learned is that there must always be checks and balances to the official exercise of power by the government.

QUESTIONTORT REMEDY FOR FOURTH AMENDMENT ABUSES

ONE ARGUMENT LEVELLED AGAINST THE TORT REMEDY PROPOSAL FOR FOURTH AMENDMENT ABUSES IS THAT A JURY IS UNLIKELY TO AWARD SUBSTAN-

TIAL DAMAGES EVEN FOR CASES OF SERIOUS POLICE MISCONDUCT BECAUSE OF THE CONTRASTING WAYS THAT JURORS ARE LIKELY TO PERCEIVE THE PARTIES TO THE SUIT. ON THE ONE HAND, THE PLAINTIFF WHO IS EITHER CONVICTED OF OR CHARGED WITH A CRIME WILL NOT BE A SYMPATHETIC FIGURE. ON THE OTHER HAND, THE POLICE OFFICER, WHO WILL CLAIM THAT HE WAS JUST DOING HIS JOB, OFTEN WILL BE VIEWED BY THE JURY IN A MORE FAVORABLE LIGHT. WHAT ARE YOUR THOUGHTS ON THIS ISSUE?

ANSWER

The argument stated here is a reflection of reality. Indeed it has been the experience that even where the Plaintiff is not accused of a crime, he or she comes into court with credibility inferior to that of a policeman. This is a natural phenomenon. We grant to our police the sole right to the legitimate use of force in our society. A natural corollary of this grant is that we must at least to some extent trust the persons imbued with this monopoly to exercise it in our interest. When the interest of the policeman and the citizenry diverge, the power very often becomes a weapon of oppression. We make our law enforcement officers subject to the same laws as ourselves and then we trust and pray that they will discharge their duties accordingly. As children, we are taught that the policeman is our friend and a doer of right and good. We then internalize this image which becomes the foundation for the legitimacy of the police. If we did not at least to some extent believe in the moral quality of these officers, then government would lose its legitimacy. Lacking legitimacy, only brute force would enable the police to regulate our affairs. Hence, we all have a stake in our police being law-abiding public servants.

QUESTION

FAIRNESS OF DAMAGE REMEDY FOR FOURTH AMENDMENT VIOLATIONS

1. ALTHOUGH INDIGENT DEFENDANTS HAVE A RIGHT TO COURT-APPOINTED COUNSEL IN CRIMINAL PROCEEDINGS, SUCH DEFENDANTS HAVE NO RIGHT TO HAVE THAT COUNSEL PURSUE A CIVIL DAMAGE ACTION FOR THEM. THUS, ONLY THOSE PERSONS AGGRIEVED BY AN ILLEGAL SEARCH OR SEIZURE WHO CAN AFFORD PRIVATE COUNSEL WOULD BE ABLE TO VINDICATE THEIR RIGHTS THROUGH A CIVIL DAM-

AGE REMEDY, WHEREAS ALL CRIMINAL DEFENDANTS CAN INVOKE THE EXCLUSIONARY RULE REGARDLESS OF THEIR WEALTH. EVEN THOSE INDIVIDUALS ABLE TO AFFORD PRIVATE COUNSEL ARE LIKELY TO BE UNSYMPATHETIC FIGURES IN THE EYES OF THE JURY, AND EVEN WHERE THEY ARE ENTITLED TO SOME RECOVERY AS A MATTER OF LAW THIS RECOVERY IS LIKELY TO BE NOMINAL. IN SUCH CIRCUMSTANCES, DOES A CIVIL DAMAGE REMEDY REALLY PROVIDE ALL PERSONS WITH EQUAL PROTECTION OF THE LAWS? WILL IT BE AS AVAILABLE TO THE POOR AS IT IS TO THE WEALTHY? IF NOT, WILL IT DETER THE POLICE FROM VIOLATING THE FOURTH AMENDMENT RIGHTS OF THE POOR TO THE SAME DEGREE IT FORCES THE POLICE TO OBSERVE THE RIGHTS OF THE WEALTHY?

2. S. 751 CONTAINS A PROVISION AUTHORIZING THE AWARD OF ATTORNEY FEES TO ANY CLAIMANT WHO PREVAILS IN A CIVIL DAMAGE ACTION FOR A FOURTH AMENDMENT VIOLATION. WILL THIS ELIMINATE THE INEQUITABLE ASPECTS OF REPLACING THE EXCLUSIONARY RULE WITH A CIVIL DAMAGE REMEDY? SHOULD THE COURT BE REQUIRED TO AWARD ATTORNEY FEES TO A SUCCESSFUL CLAIMANT, RATHER THAN MERELY HAVING DISCRETION TO DO SO, AT LEAST WHERE THE CLAIMANT IS INDIGENT?

ANSWER

1. The rich and the poor are likewise forbidden to sleep under bridges, that is the reality of the civil tort remedy. The minimal likelihood of obtaining damages discussed earlier discourages attorneys from taking such cases on a contingent fee basis and, given that the vast majority of criminal defendants are indigent, means that access to this remedy is very limited. Police have relatively little reason or opportunity to violate the rights of the rich and often violate the rights of the poor. This is merely a reflection of the demographics of the criminal justice system. Further, the plaintiff is stigmatized by his involvement in the criminal justice system as a defendant, a stigma which is more easily ignored by judges than juries. Another aspect of money damages which poses problems in this contest is valuation. Juries would put a higher value on the rights of a bank president than a twice convicted heroin dealer, yet there would be no distinction in the law regarding the violation of their rights.

2. The award of attorney's fees under S. 751 will do little if anything to ameliorate the disparity of opportunity for vindication of Fourth Amendment rights. Insofar as they are discretionary, the attorney's fees will be subject to the same kind of valuation problem mentioned above. The benefit to the plaintiff is a factor usually taken into account in the discretionary award of attorney's fees. Another negative aspect of this scheme is that in addition to being contingent upon winning, the award of fees lies in the distant future. Given the crowded nature of the district courts' civil dockets, the cases may not be tried for at least a year after filing. As a result, any return to the attorney is far removed in time from the decision to undertake the case. Money in the future is normally discounted from its present value in commercial contexts and should be viewed in the same way in regard to attorney's fees. Yet this factor is almost never taken into account in the decision to award fees after the fact of the litigation.

A major portion of the bar avoids participation in the criminal justice system. One reason for this is often a disinclination to associate with criminal defendants. Compensation which will probably be inadequate and long in coming is not likely to overcome that disinclination. Lawyers will further take a cue from the Criminal Justice Act as a measure of the range of compensation which they might expect. After the ravages of inflation, they provide precious little encouragement to the active lawyer to turn away from other civil cases to engage in this kind of litigation. It has been found time and time again that there is a direct relationship between the quality of counsel and the likelihood of meaningful compensation.

ADDITIONAL CORRESPONDENCE TO SUBCOMMITTEE CHAIRMAN

CHARLES MCC. MATHIAS, JR.



State of California

Department of Justice

George Deukmejian

PRODUCED CASE-847-004

Attorney General

900 CAPITOL MALL, SUITE 900
SACRAMENTO 95814
(916) 445-0000

April 8, 1982

Honorable Charles M. Mathias, Jr.
Chairman, Senate Judiciary
Subcommittee on Criminal Law
Dirksen Senate Office Building
Room 2226
Washington, D.C. 20510

Attention: Michael Klipper

Dear Senator Mathias:

Re: Senate Bills 101 and 751

In our earlier letter to you of March 11, 1982, we indicated we would send you a sampling of cases from California which demonstrate the harmful effects and ridiculous results of application of the Exclusionary Rule here. The following is a representative sample of such cases:

1. People v. Riegler (1982) 127 Cal.App.3d 317.

A lawful customs search uncovered hashish in two packages. A search warrant was secured for the premises of the addressee and the packages. The packages were then delivered under police surveillance. Before the warrant could be executed, defendant drove away from the premises with the packages. Police followed and later stopped the car and saw packages in plain view. The packages were later opened at the police station. The court held that police needed a second warrant to open the packages.

2. People v. Lovelace (1981) 116 Cal.App.3d 541; 172 Cal.Rptr. 65.

A search warrant was invalidated which was based on a police officer's observations from a public alley of marijuana plants through holes and gaps in a fence of a backyard.

3. People v. Hackett (1981) 115 Cal.App.3d 592; 171 Cal.Rptr. 320.

A thief may assert his victim's right of privacy in the automobile he steals.

Contra: Alderman v. United States (1969) 394 U.S. 156.

4. Jennings v. Superior Court (1980) 104 Cal.App.3d 50; 163 Cal.Rptr. 488.

A San Francisco police officer arrested the defendant under a municipal ordinance prohibiting obstruction of public passageways. The appellate court suppressed twenty balloons of heroin the defendant had concealed in the back seat of a police car while being transported to the station house. The court conceded that the officer acted properly but held the law he enforced unconstitutional.

as enacted. The evidence was suppressed not to deter unlawful police conduct but because a legislative body erred.

Contra: Michigan v. DeFillippo (1979) 443 U.S. 1.

5. In re Melvin L. (1980) 163 Cal.Rptr. 772.
(Ordered not to be published in official reports.)

Police officers patrolling a six-block area in which 25 to 30 daytime burglaries had been committed within the preceding five days stopped a 15 to 16 year old male carrying a suitcase. A fur piece protruded from the suitcase; a camera protruded from the youth's jacket. A consent search of the suitcase disclosed fur coats, jewelry, watches, and two handguns, one loaded. All of this evidence was suppressed because the police decided to interview the youth before they observed the fur and camera although the officers did not actually detain him or otherwise intrude into his right of privacy until after observing these objects.

Contra: Scott v. United States (1978) 436 U.S. 128.

6. People v. Zelinski (1979) 24 Cal.3d 357;
155 Cal.Rptr. 575; 594 P.2d 1000.

Exclusionary rule applied to drugs found after private security guard at a department store searched shoplifter pursuant to citizen's arrest.

Arguably contra: Burdeau v. McDowell (1921)
256 U.S. 465.

7. In re Scott K. (1979) 24 Cal.3d 395; 155
Cal.Rptr. 671; 595 P.2d 105.

Police officers could not reasonably rely upon consent of father to search of minor son's locked toolbox.

8. Phelan v. Superior Court (1979) 90 Cal.App.3d
1005; 153 Cal.Rptr. 738.

Police received tip of growing marijuana in rural area and obtained permission from adjoining landowner to enter his property to observe the contraband. Their observations were inadvertently made from defendant's property. This fact, plus that defendant had attempted to but did not conceal marijuana plants, convinced the court to suppress the evidence.

9. Tavernetti v. Superior Court (1978) 22 Cal.3d
187; 148 Cal.Rptr. 883; 583 P.2d 737.

A telephone lineman testing a line for malfunction innocently overheard conversations regarding illegal drugs. A search warrant was obtained. The court invalidated the warrant using the rationale that the duty to report crime was overridden by public policy favoring right to privacy embodied in wiretapping statutes.

10. Tucker v. Superior Court (1978) 84 Cal.App.3d
43; 148 Cal.Rptr. 167.

Defendant was arrested at a restaurant as an armed robbery suspect. Since defendant was cold and shivering, the police officer directed an employee to get his jacket. The employee removed his jacket from a locker and found a bank money bag in a pocket. The court deemed the employee was an agent for the police and suppressed the evidence.

11. People v. Keller (1978) 76 Cal.App.3d 827;
143 Cal.Rptr. 184.

As a court-imposed condition of probation defendant consented to submit to searches. Pursuant to that search condition, officers searched defendant's premises and found contraband. The appellate court suppressed the fruits of that search on the ground that the court granting probation had imposed an unreasonable condition.

12. People v. Scott (1976) 16 Cal.3d 242;
128 Cal.Rptr. 39; 546 P.2d 327.

Shortly after midnight on New Year's Eve two California Highway Patrolmen observed defendant, accompanied by a three-year-old boy, standing by a Marin County freeway. Defendant was urinating; his eyes were extremely bloodshot, his pupils were dilated, his balance was unsteady; he was somewhat incoherent. Defendant claimed he lived in Virginia and was returning his son to his mother at an unknown address on California Street in San Francisco.

Rather than arrest defendant on a variety of available charges, to avoid taking the frightened and crying child into custody, the officers decided to drive them both to their San Francisco destination. For self-protection the officers pat-searched defendant for weapons. Marijuana came into plain view during the frisk. The officers then arrested defendant; an incidental search disclosed 454 LSD tablets.

Acknowledging that the officers acted with "discretion, perhaps compassion," a bare majority suppressed the contraband because the officers had conducted an unauthorized limited weapons search rather than arresting defendant and conducting a full personal search.

13. People v. Jones (1973) 30 Cal.App.3d 852;
106 Cal.Rptr. 749.

F.B.I. agents, acting upon the authorization of a federal judge and pursuant to federal statutes, monitored telephone conversations later introduced against defendant before a state grand jury.

Recognizing that the federal agents acted lawfully, and absent any suggestion that the F.B.I. acted on behalf of the state, the state courts nevertheless suppressed the evidence and set aside the resulting indictment because state officers could not have done the same thing under state law.

14. Charney v. Superior Court (1972) 27 Cal.App.3d 888; 104 Cal.Rptr. 213.

Narcotics found during a search conducted under a warrant were suppressed because the magistrate, dissatisfied with the affidavit's sufficiency, did not memorialize supplemental information establishing probable cause in the exact form required by statute. Instead of having the affiant sign an addendum to the affidavit, the magistrate signed his own name, writing "Affiant has sworn to truth of above."

15. People v. Krivda (1971) 5 Cal.3d 357; 96 Cal.Rptr. 62; 486 P.2d 1262.

Court held that defendants have reasonable expectation of privacy that police will not search a garbage can which has been placed on a public sidewalk for garbage collection.

16. People v. Rawlins, Filed May 23, 1980,
unpublished, 2 Crim. 35803.

Sheriff's deputies on patrol were approached at 2:20 a.m. by a woman running toward them who was looking toward a van and screaming "He is hurting her. . . . He has a gun. . . . Do something. . . . Oh, my God." Appellant, carrying a red pack over his left shoulder, and a male companion emerged from the van and started walking along the street. They were detained by the deputies and during a pat down, a firearm with live rounds was removed from appellant. Appellant was arrested and handcuffed. The deputies then searched appellant's red pack for further weapons and recovered a glass jar containing nine PCP cigarettes.

The Court of Appeal relying primarily on federal law, United States v. Chadwick (1976) 433 U.S. 1, but also citing People v. Dalton, 24 Cal.3d 850, suppressed the nine PCP cigarettes on the ground that at the time of the search, the red pack had left appellant's control and the deputies should have applied for a search warrant. Appellant's conviction for possession of phencyclidine was reversed.

17. People v. Rapa and Shirinian, 1 Crim. 21033, Filed August 5, 1981, unpublished.

An undercover officer twice purchased cocaine from defendant at defendant's apartment. A third purchase, of a large quantity of cocaine was arranged. Intending to arrest defendant upon delivery of this amount, the officer entered defendant's residence. When defendant produced the drug he was arrested.

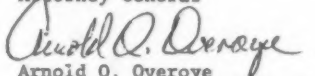
A 2-1 majority suppressed the cocaine because the undercover officer failed to obtain an arrest warrant. In so concluding in this unpublished opinion, the majority repudiated its own recent published opinion (Toubus v. Superior Court (1981) 114 Cal.App.3d 378) to the contrary. Thus, the Fourth Division of the First Appellate District has set forth coexisting but conflicting overt and covert rules.

It can readily be seen from the foregoing that modification or elimination of the Exclusionary Rule is long past due.

If we can be of further assistance to you, please do not hesitate to ask.

Very truly yours,

George Deukmejian
Attorney General


Arnold O. Overoye
Assistant Attorney General

AOO:ETK:llw

UNITED STATES COURT OF APPEALS
WASHINGTON, D. C. 20001MALCOLM RICHARD WILKEY
UNITED STATES CIRCUIT JUDGE

16 April 1982

The Honorable Charles McC. Mathias, Jr.
United States Senator
Committee on the Judiciary
Washington, D.C. 20510

Attention: Michael R. Klipper, Chief Counsel
Subcommittee on Criminal Law

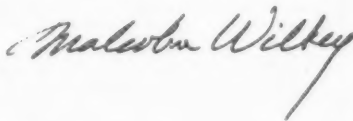
Dear Senator Mathias:

In response to your letter of 31 March asking for written comments on certain questions, I am pleased to enclose my written responses.

I am glad of the opportunity to do so, because these questions are particularly well thought out, and with time to reflect on them the answers of myself and other witnesses should be of more value to the committee than our extemporaneous comments at the oral hearing.

With kindest regards, I remain

Sincerely,



ABOLITION OF THE EXCLUSIONARY RULE AS A CURE FOR THE CONFUSION IN
FOURTH AMENDMENT LAW

I.

Frank Carrington is quite correct that search and seizure law is so confusing that the police cannot be expected to be deterred by the exclusionary rule.

No policeman's conduct can be deterred, no human being's actions can be influenced, by a rule of law which is either unknown to him, so confused as to be not understandable by him, or changed after the conduct referred to. A fine example of why the confusion in Fourth Amendment law, with all of its refined technicalities, makes it impossible for honest policemen to be influenced by it even if they want to is United States v. Ross, 655 F.2d 1159 (1981), cert. granted, 102 S. Ct. 386 (1981).

Detective Cassidy opened the trunk of Ross' car and discovered a brown paper bag and a leather satchel. He opened them -- 17 months after the Supreme

Court decided United States v. Chadwick, 433 U.S. 1 (1977), and many months before the Supreme Court decided Arkansas v. Sanders, 442 U.S. 753 (1979). At the time when Detective Cassidy was called upon to take the action that he did, judges and other learned scholars had been discussing for many months the meaning of the Supreme Court's decision in Chadwick and considering what would be the rule in the type case which eventually came about in Sanders and in Ross. The best informed commentary had concluded that in view of Chadwick it was no longer possible to predict how the Supreme Court would treat the matter. Professor Wayne LaFave, in his well-known treatise published at about the time Detective Cassidy opened Ross' trunk, summarized the situation as follows: "It is impossible to predict how the Court would decide [a case like Sanders], for the reasoning in Chadwick and the Court's car-search cases does not all point in a single direction." 2 W. LAFAVE, Search and Seizure § 7.2, at 538-39 (1978).

If the answer to the legal questioning governing Detective Cassidy's conduct was unknown to Professor LaFave, it was at least equally unknown to Cassidy. Furthermore, if Detective Cassidy, when he confronted Ross' paper bag and leather pouch, had been accompanied by a visiting "advisory committee" composed of Circuit Judges Friendly, Mansfield, and Meskill of the Second Circuit (based on the Second Circuit's case of United States v. Ochs, 595 F.2d 1247, 1254-55 (2d Cir.), cert. denied, 444 U.S. 955 (1979)), two of the three judges would have told him that he did not need a warrant to open the containers he had found. Yet, when Ross' case came to trial, after the Supreme Court decided Sanders, the majority of the D.C. Circuit charged Detective Cassidy with the knowledge that he did need a warrant to satisfy the Constitution.

If the Supreme Court ultimately reverses the D.C. Circuit (Ross is undecided after argument as of 16 April 1982), Cassidy may be proved right and the majority of the D.C. Circuit wrong. Should we put some of my colleagues out on foot patrol and elevate Cassidy to the bench? Or should we say that the law is so fouled up in the area of search and seizure that there is no longer any such thing as legal judgment?

This is just one example, but the situation is repeated many, many times over. If the judges and the academicians cannot tell what the law should be in a given fact situation, how in the world can we charge ordinary policemen with knowing this? And if the policemen can't know it, how can they possibly be deterred from illegal conduct -- as subsequently determined?

II.

The reverse relationship must be examined. Search and seizure law is so confusing, so technical, with so many fine lines of distinction precisely because we have an exclusionary rule of evidence. If the fate of the defendant were not to be determined by the ruling on search and seizure of tangible evidence, as in nearly every case it is, then the trial judges -- and the Supreme Court itself -- would not be required to lay down the law with the fine niceties that they have. There would not be the squirming around by trial judges to find some minor distinction in order to prevent an obviously guilty defendant from going free, nor later would there be the necessary repair work by the Supreme Court to keep intact reasonable rules of search and seizure under the Fourth Amendment. The exclusionary rule distorts and corrupts the standards which we ought to have to govern search and seizure under the Fourth Amendment.

Once the rule is abolished, the courts can devote themselves to laying down simple broad rules which will be effective guides to the police and effective protection for all citizens.

That is the answer to the question "How will abolition of the rule alleviate the confusion in Fourth Amendment jurisprudence?"

III.

Of course we will always have to make requirements of the Fourth Amendment understandable to the officer on the street regardless of the remedy we choose to enforce the protections of that amendment. As stated above, both the courts and Congress can make Fourth Amendment law more understandable to -- and enforceable by -- the officer on the street once the distorting effect of the exclusionary rule is eliminated.

IV.

What can Congress do to help clarify the scope and meaning of the law of search and seizure? It can do a lot.

What is the constitutional guaranty which we seek to preserve and enforce here? That guaranty is "the right of the people to be secure . . . against unreasonable searches and seizures." What makes a search unreasonable is the absence of sufficient probable cause to justify the search. Therefore, the level of probable cause required determines the permissible conduct of the police.

I make no effort to cite literally hundreds of cases in which the standard of probable cause required by the courts, particularly

the appellate courts, was so unreasonable as to appear absurd, silly, and fatuous to laymen and lawyers alike. Nor do I cite other hundreds of cases, usually at the trial level, in which the judge declined to enforce a level of probable cause which many would feel called for, simply because he did not want to see an obviously guilty felon set free because of an insubstantial violation by the police.

The definition of "unreasonable searches and seizures," and, of course, "probable cause," is nowhere found in the Constitution. It has been a matter for the courts to decide, but it could be a matter for Congress. One of the most sensible formulations was made by former Solicitor General Erwin Griswold, in stating his rule of thumb on seeking certiorari: "If the police officer acted decently, and if he did what you would expect a good, careful, and conscientious police officer to do under the circumstances, then he should be supported." Erwin N. Griswold, Search and Seizure: A Dilemma of the Supreme Court 57-58 (1975).

Dean Griswold did not assert, and neither do I, that this would be sufficient for a judicial standard, but it surely is not beyond the realm of possibility for Congress to define a standard of reasonable search and seizure, i.e., the level of probable cause required, in terms which would meet more commonsense standards than what we find in many appellate decisions. Such a definition by Congress of what is a reasonable and an unreasonable search and seizure might be buttressed in the legislative history by a recital of some representative cases which have required absurd levels of probable cause which no longer could be considered as governing precedent in light of the new statutory standard. In determining such a statutory standard of "reasonableness," which is always Congress' prerogative, Congress might look at our own experience and mores as well as the standards of probable cause for search and seizure used in other civilized nations with cultures similar to our own.

"It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). It is equally apparent that Congress may, in the first instance, describe for purposes of law enforcement such things as what may give rise to "probable cause" and when a warrant may be dispensed with. See 18 U.S.C. § 2518(7) authorizing warrantless wiretaps in specific circumstances. Statutory characterizations of constitutional provisions will be subject to judicial review, of course, to assure harmony with the judicial understanding of the constitutional requirement, but a prior legislative determination

might appropriately inform the content of such opened-ended language as "unreasonable" and "probable cause." Cf. Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978) : (probable cause to conduct an administrative search may be based on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment).

This review of the standard of reasonableness, i.e., the requisite level of probable cause, should not be made, if at all, until after we have abolished the exclusionary rule and gained some experience with alternative methods of protecting the privacy of individuals and controlling the police. What is "reasonable" is always a function of past experience applied to present time, place, and circumstances. We need to see how the police operate under a new dispensation and how the courts construe "probable cause" without the overhanging distortion of the exclusionary rule threatening to free undeniably guilty criminals. Only then can we evaluate the standard of reasonableness and probable cause.

THE VIABILITY OF JUDICIAL INTEGRITY RATIONALE

I.

I agree that if one of the current objectives of the exclusionary rule is to protect the integrity of the judicial process, then evidence unlawfully obtained by private parties logically should be excluded -- but, of course, it is not and never has been. The reason that evidence unlawfully obtained by private parties is not excluded is because today the only rationale of the rule is deterrence, hence it makes no sense to cause the government to forfeit a case in court by excluding the evidence, when there is no reasonable expectation that the actions of private parties would be "deterred." We all should recognize that the theory of deterrence as applied to excluding evidence offered by the prosecutor, because some policeman over whom the prosecutor had absolutely no control whatsoever made a mistake previously, is itself tenuous in the extreme. Applying the exclusionary rule to the actions of private parties is obviously so much more tenuous that it has not been done.

I would make a similar comment in regard to the rules of standing developed by the Supreme Court which preclude certain individuals from invoking the exclusionary rule. In those situations the Court recognizes that deterrence is so farfetched that it refuses to grant standing to the parties to claim protection of the rule:

II.

Let me examine another area about which you did not inquire, but which illustrates -- even better than do the standing and private action limitations -- that "judicial integrity" cannot be relied upon as a valid rationale for the exclusionary rule.

The rationale of judicial integrity is totally contradicted by our courts' unquestioned willingness to try defendants who themselves have been illegally seized and brought before them. In five cases, stretching over a period of 100 years, the Supreme Court has adhered to the rule that it matters not how the prosecution obtained the presence of the accused in court, he will be tried.

In Ker v. Illinois, 119 U.S. 436 (1886), a defendant kidnapped in Peru was brought by force to Illinois for trial; in Mahon v. Justice, 127 U.S. 700 (1888), the accused was forcibly abducted from West Virginia for trial in Kentucky; in Frisbie v. Collins, 342 U.S. 519 (1952), the defendant was forcibly seized in Illinois for trial in Michigan; in Gerstein v. Pugh, 420 U.S. 103, 119 (1975), there was insufficient probable cause for the arrest and prosecution by information; and in U.S. v. Crews, 445 U.S. 463, 477, 478 (1980), the accused's original detention was likewise without probable cause. In all cases the Supreme Court squarely stated that, whatever means were used to produce the accused for trial, a conviction would not upset.

In Frisbie Justice Black, who has some credentials as a civil libertarian, wrote for the Court:

This court has never departed from the rule announced in Ker v. Illinois . . . that the power of the court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction." 342 U.S. at 522.

Compare the above by a unanimous Supreme Court with the laconic observation of an English judge in regard to the admissibility of material evidence almost a century earlier: "It matters not how you get it; if you steal it, it will still be admissible in evidence." Crompton, J., in Regina v. Leatham [1861], 8 Cox C.C. 498 at 501. Later in Frisbie Justice Black noted: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." 342 U.S. at 522.

In all five Supreme Court decisions, stretching from 1886 through 1980, not a single Justice dissented from the rule as stated by Justice Black. Why should there be an exclusionary rule for illegally seized

material evidence when there is no such exclusionary rule for illegally seized people? It makes no sense to argue that the admission of illegally seized evidence violates "judicial integrity" and demeans our system of justice when the judiciary's trial of an illegally seized person carries no such stigma.

III.

Not only does the practice of the courts in these various situations demonstrate that judicial integrity is not the prevailing rationale, but it is clear that this rationale is deeply and inherently flawed. The Subcommittee's question cites Justice Brennan's fear that allowing the Government to use illegally seized evidence would create a "risk of seriously undermining popular trust in government." Yet isn't this the precise result that follows when the exclusionary rule is applied? Is there anything that more seriously undermines popular trust in Government than when courts free an obviously guilty murderer or rapist on a ground completely unrelated to his guilt?

The same flaw exists in the argument that police officers will not respect the law if they see the courts permitting the use of illegally obtained evidence. If the law's legitimacy is our concern, isn't it apparent that someone who has committed a serious crime, and whose guilt is obvious to everyone including the trial judge, will never respect and obey a legal system which refuses to punish him in spite of his guilt? If utilizing the evidence would soil the judiciary with "the taint of partnership in official lawlessness," as Justice Brennan asserts, does not freeing an obviously guilty criminal also make the criminal justice system an abettor of private lawlessness?

What this points out is that the judicial integrity rationale put forth by exclusionary rule proponents represents a distorted and one-sided perspective of the entire situation. The rule's destructive impact on the courts' respectability and the law's legitimacy must not be ignored. Indeed, in my view any serious look at the "popular mistrust" of the Government in relation to the criminal justice system inevitably highlights the failure of the exclusionary rule.

IV.

Efforts to resurrect other rationales, long since

discarded by the Supreme Court, are a very revealing admission by even the rule's most ardent supporters that deterrence has not been demonstrated by seventy years of experience, and suggest a sneaking suspicion that deterrence is impossible to prove. While from Weeks (1914) to Mapp (1961) the rule was justified as protecting the privacy of the individual, the Supreme Court later downgraded this rationale:

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: 'the ruptured privacy of the victim's homes and effects cannot be restored.' Reparation comes too late. Linkletter v. Walker, 381 U.S. 618, 637 (1965)."U.S. v. Calandra, 414 U.S. 338, 347 (1974).

And while Justice Clark in Mapp did refer to "that judicial integrity so necessary in the true administration of justice" (367 U.S. at 660), four years later he wrote for the court unequivocally:

"... all of the cases since Wolf requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." Linkletter v. Walker, 381 U.S. 618, 636-7 (1965).

More recently Justice Powell for the Court reaffirmed this: "The rule's prime purpose is to deter future unlawful police conduct." U.S. v. Calandra, 414 U.S. 338, 374 (1974).

So it won't do for supporters of the rule to scurry back to the original but discarded rationales of privacy and judicial integrity as the effectiveness of deterrence is shown to be unproved and unprovable. And the unequivocal refutation to the rules' supporters above comes not from the rules' critics but from the Supreme Court itself.

RELEVANT AND RELIABLE EVIDENCE

Certainly it is true that evidentiary privileges work to exclude reliable and relevant evidence. But a careful analysis of the purposes behind these privileges reveals that the "rationale" underlying the exclusionary rule is not even superficially analogous.

The overriding policy underlying the basic evidentiary privileges is the preservation of confidentiality. Many of the privileges exist to preserve confidential interpersonal relationships -- for example, husband-wife, lawyer-client, doctor-patient. The other privileges are aimed at preventing the release of information, for various and obvious policy reasons. Thus we have privileges for the identity of a police informer, for the political votes cast by a person, for trade

secrets, and for state secrets and other official information.

In each of these cases, the legal system makes the rational evaluation that the preservation of confidentiality is of greater public interest than the availability of the evidence thereby excluded. The crucial fact about making this determination in any of these situations is that there is no alternative. If the evidence or testimony is required in open court, the underlying confidentiality interest vanishes. Thus there is a stark choice between disclosure or a privilege. Whatever the decision there will be a gain and a cost, and we can hope only that we can achieve a net benefit.

The case of the exclusionary rule is exactly the opposite. If the evidence is admitted the Fourth Amendment interest at stake is not inherently and irretrievably forsaken. Alternatives do exist. The police officer may be disciplined, and the victim of the illegal search may recover damages. Moreover, when we recognize an evidentiary privilege, the benefit gained is clear and tangible: the confidential information is protected. But with the exclusionary rule we are asked to put our faith behind the assumption that if we throw out enough solid evidence and let enough guilty criminals go free, we ultimately will achieve a greater protection of Fourth Amendment rights. The dubious nature of this reasoning, when combined with a recognition of the available alternatives for directly vindicating the Fourth Amendment interests at stake, makes clear that we are throwing away important and irrefutable evidence for no good reason.

Note that the values lost by the exclusionary rule are disproportionately large compared to the values lost by invoking other privileges. The rule excluding the most critical material evidence nearly always results in the acquittal of an obviously guilty accused. The testimony of a spouse excluded by the husband-wife privilege may range in importance from the decisive to the trivial. The same can be said of the other testimonial privileges. The cost of the exclusionary rule is uniformly high.

When the purposes of the various evidentiary privileges and the exclusionary rule are thus compared, it becomes apparent that the analogy suggested by the Subcommittee's question is not an apt one. Opposing the exclusionary rule does not mean implying that the policy grounds underlying the evidentiary privileges are more important than the constitutional and policy

grounds implicated by the Fourth Amendment. Rather, opposing the exclusionary rule means recognizing the lesson to be drawn from an analysis of the evidentiary privileges: reliable and relevant evidence should not be discarded lightly, and in any event only if there are no alternatives by which we can promote the policy interest at stake while retaining the availability of the evidence for use in court. The exclusionary rule fails this test completely.

SCOPE OF CONGRESSIONAL AUTHORITY

I.

I agree that the "exclusionary rule is a judge-made rule of evidence that Congress can negate." I say I agree, because many Justices of the Supreme Court have said that, and I follow them.

Let us note at the outset that in contrast to many other issues which the subcommittee is addressing and on which witnesses have spoken very freely, the question of congressional authority is not a policy question on which we all are free to express views and the Congress is entirely free to make a choice. While it is the duty of the committee to assay the constitutional question involved, we all must recognize that the ultimate answer on constitutionality is in the hands of the High Court. Therefore, what the other witnesses and I tell this subcommittee should not be an expression of our own personal preferences, but should be an honest appraisal of where the Justices of the Supreme Court stand.

The exclusionary rule is not a rule required by the Constitution. No Supreme Court has ever held that it was. As Justice Black once said,

The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures.

Mapp v. Ohio, 367 U.S. 643, 661-62 (1961) (concurring opinion).

It is clear from the way the rule originated in United States v. Weeks (1914) that the Court was simply choosing a method of enforcement of the Fourth Amendment. In his memoirs Justice Douglas confirmed this, saying that at the time the Court confronted the choice of three possible methods, that it chose the exclusionary rule, and he believed chose correctly.

If one goes through the search and seizure opinion of the Supreme Court for the last 20 years, one finds a reiteration by one

Justice after another that this is a method of enforcing the constitutional protection, not necessarily the precise method commanded by the Constitution, but one chosen by the High Court. One can find this in the opinions by Chief Justice Burger, and Justices Stewart, White, Blackman, Powell and Rehnquist. The very manner in which they have spoken of the rule and its rationale of deterrence show that they regard it as a chosen method, a method about which they are having increasing doubts.

It is significant that in the two long articles Professor Yale Kamisar wrote in 62 Judicature 66 and 337 (1978-79), he nowhere claimed that the Fourth Amendment necessarily mandated the exclusionary rule to the exclusion of any other remedy. He argued only that, under the Constitution, we have a choice of methods to enforce the ban against unreasonable search and seizure and that the exclusionary rule is the best choice. Also, in the very last sentence of his prepared testimony before the Senate subcommittee on 25 March 1982 Professor Kamisar stated: "Indeed, it is not inconceivable that the availability of a vastly improved civil remedy would lead the Supreme Court on its own to repeal, or at least curtail, the exclusionary rule." Obviously, if the Supreme Court is free to repeal the exclusionary rule -- which I certainly think it is -- then the exclusionary rule is not constitutionally required. It is only the remedy chosen by the Supreme Court, and other methods, if reasonably believed to be effective and equally or better suited in enforcing the Fourth Amendment, could be adopted. The Constitution prohibits unreasonable searches and seizures, it may mandate a remedy to enforce that prohibition, but nowhere does the Constitution mandate the exclusion of all other possible remedies.

Implementing constitutional provisions is by no means reserved to the judiciary; in fact, it is usually only when the legislative branch is seen to have failed in implementing a constitutional provision that the judiciary feels compelled to take action.

II.

The attempt to deduce a constitutional requirement from the language in Mapp, with reference to the supervisory power, etc., is a red herring and a complete confusion of the meaning of Mapp.

Mapp did not pretend to rest on the exercise of the Supreme Court's supervisory power, because while the Supreme Court does have

that power over the lower federal courts, it certainly doesn't have it over the states. Mapp was the last case which relied on protecting the privacy of the individual as a rationale for the exclusionary rule, and it was this privacy rationale that justified applying the rule to the states. Justice Clark very plainly stated: "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the due-process clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the federal government." 367 U.S. at 655.

I read this language, and that quoted in the committee's question, simply to say that the states are constitutionally obligated to protect the right of privacy just as is the federal government, and that the exclusionary rule, if it is reasonable in the federal system, is equally reasonable as the method of enforcing the Fourth (Fourteenth) Amendment in the states. This and nothing more. The quotation in the committee's question adds nothing to the argument that the rule itself, as distinguished from some method of implementing the Fourth Amendment, is constitutionally required.

This last statement is clear when we recall that it was precisely in Mapp that Justice Black, whose fifth vote was necessary to the decision, said in his concurrence: "The Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence and I am extremely doubtful that such provision could properly be inferred from nothing more than the basic demand against unreasonable searches and seizures." 367 U.S. at 661-62. The result reached in Mapp thus must rest, not only on Justice Clark's opinion, but also on Justice Black's opinion. It is thus impossible to argue that the exclusionary rule is now constitutionally mandated by Mapp, no matter how Clark's opinion is interpreted.

III.

It is significant that the Supreme Court did rely on the privacy rationale in Mapp (1960), because chronologically this is an anomaly. Remember that in Linkletter four years later Justice Clark was to write that ". . . all of the cases since Wolf [1949] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." 381 U.S. at 636-37 (1965). Beginning in Wolf (1949) the High Court had abandoned the privacy rationale in favor of deterrence, but in Mapp (1961) it went back to the privacy rationale to apply the

exclusionary rule to the states. There may have been a serious question about imposing the rule based on the ground of deterrence only, but the Court felt more comfortable with the rationale of privacy on the theory that the Fourteenth Amendment embraced the Fourth which covered privacy. This done in 1961, the Court was never again to cite privacy as the rationale for the exclusionary rule.

IV.

Let me emphasize again that the answer to this question on the constitutional scope of congressional authority is an answer calling for the witnesses' best judgment on what the Supreme Court has said on this matter over the years, and is not an answer in which we are free to express our "druthers." The origin of the exclusionary rule, the fact that the Supreme Court has never said that the rule itself is constitutionally mandated, and the various pronouncements of the individual Justices over the period of the last 20 years make it very clear to me that the exclusionary rule is neither of constitutional nor divine origin. Someday the Supreme Court is going to speak on this precise question, and when it does, I hope this committee will go back and look at what the different witnesses advised it on this particular question.

Again, the fact that some supporters of the rule are desperately casting about for other rationales, e.g., an exclusive constitutional mandate, other than the one cited by the High Court itself, i.e., deterrence, to sustain the rule reveals that the rule's supporters are, with deterrence as the theme, in a rapidly sinking boat and know it.

V.

In regard to the good faith exception to the exclusionary rule, the three points made to support the Congress' constitutional power have considerable rationality. Congress, in my judgment, would have the power to adopt not only the good-faith exception but a good many other alternate measures if it so desires. However, as I made clear in my testimony, I do not as a matter of policy favor the good-faith rule.

GEORGE A. NILSON
Deputy Attorney General
659-6208

ELIZABETH M. CAREY
Associate Deputy Attorney General
659-6209

MICHAEL A. MILLEMAN
Chief General Counsel and
Chief, Civil Division
659-6212

AVERY AISENSTARK
Principal Counsel
Opinions and Advice
659-6219

JAMES G. KLAIR
Principal Counsel
Administration
659-6217

PAUL F. STRAIN
Chief of Litigation
659-6210

DENNIS M. SWERNEY
Special Counsel
Administrative Matters
659-6218

DEBORAH K. HANDEL, Chief
Criminal Appeals and
Correctional Litigation Division
659-6222

STEPHEN B. CAPLIS, Chief
Correctional Litigation
659-6283



OFFICES OF THE ATTORNEY GENERAL
One South Calvert Building Baltimore, Maryland 21202

STEPHEN H. SACHS
Attorney General

(301) 659-4000

TTY for Deaf
Relay: Area 363-7333
D.C. Metro 563-0631

April 20, 1982

GARY P. JORDAN, Chief
Criminal Investigations Division
659-4132

H. ROBERT ERWIN, JR., Chief
Consumer Protection Division
26 S. Calvert Street—8th Floor
Baltimore, Maryland 21202
659-6230

K. HOUSTON MATNEY, Commissioner
Securities Division
26 S. Calvert Street—Room 801
Baltimore, Maryland 21202
659-4141

CHARLES O. MONK, II, Chief
Annuity Division
131 E. Redwood Street—Suite 701
Baltimore, Maryland 21202
659-4222

ANDREW C. TARTAGLINO, Chief
Medical Fraud Control Unit
15 Charin Plaza—Suite 301
Baltimore, Maryland 21201
659-6100

ROBERT A. ZARNOCH, Counsel
General Assembly
104 Legislative Services Bldg.
Annapolis, Maryland 21401
841-3889
859-3889 D.C. Metro

The Honorable Charles McC. Mathias, Jr.
Chairman
Senate Judiciary Subcommittee
on Criminal Law
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

Thank you for alerting me to the introduction of the additional bills to amend the exclusionary rule and for inviting my comments.

These bills adopt the "reasonable good faith" test for exclusion of evidence and state that searches pursuant to a warrant are prima facie reasonable. S. 2304 would also prohibit exclusion if to do so would "constitute a grave miscarriage of justice."

I stated my opposition to the "good faith" approach when I appeared before the committee in October. I agree with those who fear that such a rule would put a premium on "police ignorance." If the "good faith" loophole is established, a new layer of pretrial hearings in every Fourth Amendment case will test the "reasonableness" of the police officer's ignorance of the Fourth Amendment's commands. Often (very often, given the antipathy of some judges toward the rule and public pressure to jettison it) the officer's ignorance will be found to have been "reasonable". And each time unconstitutional behavior is thus excused, the bench marks of Fourth Amendment compliance will drop another notch. Such an exemption will no doubt

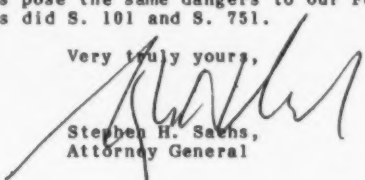
The Honorable Charles McC. Mathias, Jr.
Chairman
Senate Judiciary Subcommittee
on Criminal Law
April 20, 1982
Page 2

reduce the courses and classroom hours police will devote to the constitutional limitations on their profession because, in fact, it will pay to be ignorant. Introduction of the "reasonable good faith" test would, I fear, depress Fourth Amendment compliance to the level of our tolerance for the lowest standards of the least informed officer. And there would be no incentive to do better.

Those who seek this change point out that a police officer who obtains a warrant is obeying the Fourth Amendment command and that there is no misconduct to deter. I have two responses to this argument. First, there is value in deterring magistrates from issuing warrants on less than probable cause. Excluding evidence is as much a reminder to them as to police officers that the Fourth Amendment must be observed. Second, allowing a search warrant to insulate the probable cause determination from further review and possible reversal will encourage officers to seek out the least demanding magistrate to issue the warrant. That magistrate's conception of probable cause will become the bench mark for Fourth Amendment compliance because no judge and no appellate court will be able to correct the magistrate's mistake.

In sum, these bills pose the same dangers to our Fourth Amendment protections as did S. 101 and S. 751.

Very truly yours,


Stephen H. Sachs,
Attorney General

SHS:cz



Chicago Office:
HENRY E. SEYFARTH,
 ALE President
 Mid-Continental Plaza
 55 E. Monroe St., 42nd Floor
 Chicago, Illinois 60602
 (312) 782-2540

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

Executive Office:
Wayne W. Schmidt, Executive Director
 501 Grandview Drive, Suites 207 - 209
 South San Francisco, CA 94080
 (415) 877-0731

SPECIAL COUNSEL:
FRANK G. CARRINGTON, ESQ.
 No. 9 F & M National Bank
 Virginia Beach, VA 23461
 (804) 422-2692

JAMES P. MANAK S., ESQ.
WILLIAM E. HORNSBY J., ESQ.
 22 N. La Salle St. No. 2108
 Chicago, IL 60602
 (312) 236-1927

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Past Pres., Nat. Assn.

of A. J. Judges General
MILLER UPTON

Past, Babson College, Ret.
E. DICKERMAN WILLIAMS

Attorney, New York City

Please reply to:

Ref. No. 3166

April 20, 1982

Senator Charles McC. Mathias, Jr.
 Chairman
 Senate Judiciary Subcommittee
 on Criminal Law
 United States Senate
 Washington, DC 20510

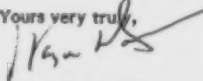
Dear Senator Mathias:

Thank you for sending me S. 2231 and S. 2304 on the Exclusionary Rule. We wholeheartedly support the concept of a good faith exception to the rule, and recognize that good faith must be an objective as well as a subjective test. The warrant presumption adequately covers searches pursuant to warrant, but good faith, as an objective concept, is unclear in the case of warrantless searches.

For that reason we believe it to be of paramount importance that the Senate, in its reported hearing summaries to be eventually published in U.S. Code, Congressional and Administrative News, give the courts some guidance.

We specifically urged a statutory definition of warrantless good faith, tied to the *Terry v. Ohio* "reasonable suspicion" standard and the over 3,000 appellate court cases which interpret that concept. In our view the statutory approach is preferable, but great weight will be placed on the Senate Hearings summary, as was done in the Civil Rights Act of 1976, 42 U.S. Code § 1988.

Again, we cannot emphasize more strongly the need to further define the objective test or tests to be employed in warrantless situations.

Yours very truly,


Wayne W. Schmidt
 Executive Director

WWSdte



AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

National Headquarters

Wayne W. Schmidt, Executive Director
Howard G. Berringer, Assistant Executive Director

501 Grandview Drive, Suites 207-209, South San Francisco, CA 94080
(415) 877-0731

Chicago Office:
JAMES P. MANAK, Jr.
AELE General Counsel
55 N. La Salle St., 6E108
Chicago, IL 60602
(312) 373-0404

DIRECTORS

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Attorney, Los Angeles
Former Calif. Atty. General

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DANIEL B. HALEIS
Attorney, Chicago
Chairman Emeritus
NACF, FIED, E. 10043
Northwestern University
(AELE Founder)

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Attorney, St. Louis, MO

ARTHUR K. BRANDSTATTER
Dr. Federal Law Enforcement
Training Center

RICHARD J. BRZECER
Superintendent
Chicago Police Dept.
JAMESON G. CAMPAIGNE, JR.
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HOWARD RICHARD B. OGILVIE
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Past Pres. Natl. Dist.
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Chicago Crime Commission

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HENRY E. SEYFARTH
AELE President Emeritus
Attorney, Chicago
MILLER UPTON
Pres. Belmont College, Pa.
C. DICKERMAN WILLIAMS
Attorney, New York City
SPECIAL COUNSEL
FRANK G. CARRINGTON, JR.
Virginia Beach, VA

May 13, 1982

Michael Klipper, Chief Counsel
Subcommittee on Criminal Law
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Klipper:

Unfortunately Senator Mathias' letter arrived while I was vacationing in Europe, thus causing this delay. My answers follow the questions; questions are retyped in CAPITAL LETTERS, while my response is in lower case.

Please feel free to contact me for further input or clarification.

You may know already that Utah has just passed Exclusionary Rule legislation, and I am sure Senator DeConcini has provided you with the new Arizona law.

A national conference on the good faith exception is planned for June 17-19, 1982, in Scottsdale, Arizona. The program will be sponsored by the Arizona Prosecuting Attorneys Council, in cooperation with three participating organizations: The Attorney General's Office of Arizona, the University of Arizona and Americans for Effective Law Enforcement.

Attorney Generals in other states and state prosecutor association officials will be invited to attend. Inasmuch as I am scheduled to be a panelist at the meeting, I will be calling your office for the last update on Senate action immediately prior to the conference. There is a persistent rumor that Senate action is not likely in this session.

Yours very truly,

Wayne W. Schmidt
Executive Director

WWS:dtc

ANSWERS OF
WAYNE W. SCHMIDT
TO QUESTIONS OF THE CHAIRMAN
SENATE SUBCOMMITTEE ON CRIMINAL LAW
RELATING TO EXCLUSIONARY RULE LEGISLATION

I Objective - Subjective Test:

I CRITICS OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE HAVE ARGUED THAT SUCH AN EXCEPTION COULD BE EASILY CIRCUMVENTED AND THUS LEAD TO AN EVISCERATION OF THE FOURTH AMENDMENT ITSELF. AS JUSTICE STEWARD HAS WRITTEN:

"(I)F SUBJECTIVE GOOD FAITH ALONE WAS THE TEST, THE PROTECTIONS OF THE FOURTH AMENDMENT WOULD EVAPORATE, AND THE PEOPLE WOULD BE 'SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS,' ONLY IN THE DISCRETION OF THE POLICE."

(Question): (A). WOULD YOU AGREE THAT A "GOOD FAITH EXCEPTION" MUST CONTAIN BOTH A SUBJECTIVE AND OBJECTIVE COMPONENT IF WE ARE TO AVOID A WHOLESALE CIRCUMVENTION OF THE FOURTH AMENDMENT?

(Answer): I agree that an objective test must accompany the subjective test.

(Question): (B). IF I UNDERSTAND YOUR STATEMENT CORRECTLY, YOU WOULD APPLY A DUAL SUBJECTIVE-OBJECTIVE TEST IN SEARCHES MADE PURSUANT TO A WARRANT AS WELL AS WARRANTLESS ONES. IS THAT CORRECT?

(Answer): No. The issuance of a warrant by an objective, detached and neutral lawyer magistrate or judge would constitute prima facie evidence that the officer or agent has acted in good faith, unless contrary evidence advanced by the defendant accuses the affiant of perpetrating a fraud on the court or of committing perjury.

(Question): (C). WHAT PERCENTAGE OF SEARCHES WOULD YOU ESTIMATE ARE MADE WITHOUT WARRANTS?

(Answer): The number of warrantless searches is dependent on the jurisdiction and the nature of the law enforcement agency. Some federal agencies almost always seek warrants; others, like the Border Patrol, rarely seek warrants. On-the-street searches are normally without warrant; residential searches, following recent decisions, are almost always with a warrant.

II Terry type cases:

II. AS I READ YOUR TESTIMONY, IN WARRANTLESS CASES, YOU SUGGEST THAT AN OFFICER'S GOOD FAITH BELIEF THAT HE HAD PROBABLE CAUSE TO CONDUCT A SEARCH WOULD NOT BE OBJECTIVELY REASONABLE UNLESS THE OFFICER POSSESSED SUFFICIENT FACTS TO AT LEAST JUSTIFY A TERRY-TYPE STOP AND FRISK. AS I UNDERSTAND TERRY, IT REQUIRES A LESSER STANDARD TO JUSTIFY A STOP AND FRISK — "REASONABLE SUSPICION" — THAN IS REQUIRED IN FULL SEARCHES — "PROBABLE CAUSE."

(Question): (A). GIVEN THE OVERWHELMING NUMBER OF WARRANTLESS SEARCHES, IS YOUR PROPOSAL SUBJECT TO THE CRITICISM THAT AS A PRACTICAL MATTER, IT WOULD RESULT IN AN ABANDONING OF THE CONSTITUTIONALLY BASED "PROBABLE CAUSE" FOR THE LESSER "REASONABLE SUSPICION" STANDARD?

(Answer): No. Officers would still need probable cause to make a lawful search, and would still strive to achieve that standard. If, however, a court should rule that the officer fell somewhat short of that standard, it would be possible to assert the good-faith exception. That would require the court to admit the evidence on less than probable cause. I have recommended the Terry standard merely because so many courts have discussed the elements of a search which is justified on a reasonable suspicion. The Terry test requires an objective component, as well as a subjective belief.

(Question): (B). YOU ARGUE THAT THE TERRY STANDARD IS WELL-DEFINED. BUT ISN'T IT TRUE THAT THESE CASES AROSE IN THE STREET ENCOUNTER CONTEXT? THEREFORE, HOW APPLICABLE IS THE TERRY STANDARD IN NON-STREET ENCOUNTER SITUATIONS BETWEEN POLICE OFFICERS AND INDIVIDUALS IN OTHER CONTEXTS? FOR EXAMPLE, SEARCHES OF HOMES BY OFFICERS? DOESN'T YOUR ARGUMENT LOSE SOME OF ITS FORCE WHEN NON-TERRY TYPE SITUATIONS ARE CONSIDERED?

(Answer): Residential searches must be pursuant to search warrant under existing Constitutional law unless there are exigent circumstances. Good faith would be presumed by the fact that a detached magistrate had issued the warrant. In the event a residence was searched without a warrant, the officer would have to introduce sufficient proof for a reasonable person to conclude that exigent circumstances existed, as well as sufficient facts to reasonably believe he possessed probable cause.

III. Objective Criterion

III. ALTHOUGH YOU SUGGEST THE USE OF AN OBJECTIVE CRITERION WITH RESPECT TO THE DETERMINATION OF WHETHER OR NOT THE OFFICER HAD A REASONABLE GOOD FAITH BELIEF THAT PROBABLE CAUSE WAS PRESENT, YOU DO NOT RECOMMEND THE USE OF AN OBJECTIVE CRITERION WITH REGARD TO THE QUESTION OF WHETHER CIRCUMSTANCES EXISTED TO EXCUSE THE NECESSITY OF A WARRANT.

(Question): (A). DOES YOUR OMISSION OF AN OBJECTIVE CRITERION IN THIS CASE MEAN THAT YOU BELIEVE THAT THIS QUESTION SHOULD TURN SOLELY ON THE SUBJECTIVE BELIEF OF THE OFFICER? IF SO, ISN'T IT SUBJECT TO THE SAME CRITICISM THAT JUSTICE STEWARD LEVELED?

(Answer): This is a misunderstanding of my intent. There is an objective test, as the officer must have "reasonably believed there were circumstances excusing the procurement of a warrant." Reasonable belief is not merely a subjective belief. To be reasonable, there must be underlying facts and circumstances which would support a subjective belief.

Second Set of Questions:

1. AS I MENTIONED IN MY OPENING REMARKS, LAST WEEK THE DEPARTMENT OF JUSTICE SUBMITTED FOR OUR CONSIDERATION A DRAFT "GOOD-FAITH" BILL. IN ITS PROPOSAL THE DEPARTMENT INCLUDES THE FOLLOWING LANGUAGE:

A SHOWING THAT THE EVIDENCE WAS OBTAINED PURSUANT TO AND WITHIN THE SCOPE OF A WARRANT CONSTITUTES PRIMA FACIE EVIDENCE OF SUCH A REASONABLE GOOD FAITH BELIEF, UNLESS THE WARRANT WAS OBTAINED THROUGH INTENTIONAL AND MATERIAL REPRESENTATION.

IN THE COMMENTARY ACCOMPANYING ITS DRAFT BILL, THE DEPARTMENT EXPLAINS THAT THE INTENTIONAL AND MATERIAL REPRESENTATION STANDARD IS CONSISTENT WITH THE SUPREME COURT'S DECISION IN FRANKS V. DELAWARE.

(Question): (1). IN YOUR TESTIMONY YOU DO NOT INCLUDE A SIMILAR CAVEAT REGARDING INTENTIONAL AND MATERIAL REPRESENTATIONS. DO YOU AGREE WITH THE DEPARTMENT'S INCLUSION OF THIS LANGUAGE? IF NOT, WHY NOT?

(Answer): I agree with the Justice Department that an intentional and material representation should negate any presumption of good faith. I would not object to including that statement within the statute.

(Question): (2). IN ITS DRAFT BILL, THE DEPARTMENT DOES NOT ELABORATE, AS YOU DO, ON THE TEST TO BE EMPLOYED IN DETERMINING WHETHER A WARRANTLESS SEARCH WAS CONDUCTED IN GOOD FAITH. IN THE ABSENCE OF SUCH LANGUAGE HOW WOULD YOU ANTICIPATE THAT THE COURTS WOULD APPLY A GOOD FAITH EXCEPTION IN WARRANTLESS SEARCHES?

(Answer): Following the Supreme Court's decision in Terry, state and federal courts floundered for definition of reasonable suspicion. Trial courts were reversed by intermediate appellate courts; appellate decisions were reversed by final courts of review. Final courts of review found it necessary to qualify or interpret their own prior opinions. It was chaos for several years. The same result would be obtained here unless Congress defines good faith.

Good faith could be defined in the statute, as I have suggested. However, the Senate could make certain findings in the Legislative History. In so doing, Congress would significantly simplify the process of courts which will seek to find legislative intent. This has been done in court decisions interpreting 42 U.S. Code

1988, which allows attorney's fees in civil rights cases to the "prevailing party." The statute does not define a prevailing party; the legislative history does, however, and the courts have followed those findings in their decisions.

Professor Kaplan's Remarks:

ANOTHER CRITICISM OF THE GOOD FAITH EXCEPTION HAS BEEN RAISED BY STANFORD LAW PROFESSOR JOHN KAPLAN, A STRONG OPPONENT OF THE RULE. AS STATED BY PROFESSOR KAPLAN:

"IT IS DIFFICULT ENOUGH TO ADMINISTER THE CURRENT EXCLUSIONARY RULE, SINCE POLICE PERJURY CAN, AND OFTEN DOES, PREVENT ACCURATE FINDINGS OF FACT. SO LONG AS LOWER COURT TRIAL JUDGES REMAIN OPPOSED ON PRINCIPAL TO THE SANCTION THEY ARE SUPPOSED TO BE ENFORCING, THE ADDITION OF ANOTHER ESPECIALLY SUBJECTIVE FACTUAL DETERMINATION WILL CONSTITUTE ALMOST AN OPEN INVITATION TO NULLIFICATION AT THE TRIAL COURT LEVEL. IN ORDER TO SUPPRESS EVIDENCE, THE TRIAL JUDGE WOULD HAVE TO FIND EVIDENCE OF THE OFFICER'S STATE OF MIND WHICH WOULD BE GENERALLY DIFFICULT TO COME BY APART FROM THE OFFICER'S SELF-SERVING AND GENERALLY UNCONTRADICTED TESTIMONY."

PLEASE COMMENT.

In order to determine whether an officer or agent has acted in good faith, the court would have to examine and weigh various underlying facts and circumstances to determine if the officer objectively acted in good faith. It would be unnecessary to prove or disprove the officer's state of mind. A strong, even positive belief of guilt would be insufficient unless there are articulable facts and events which would lead a reasonably trained officer to reasonably believe he possessed probable cause. This was mentioned by the Fifth Circuit in Footnote 4a in United States v. Williams at 622 F. 2d 841.

Amenability of the rule to Congressional alteration:

(Question): (1). WITH THE APPLICATION OF THE EXCLUSIONARY RULE TO THE STATES IN MAPP V. OHIO, THE RULE COULD NO LONGER BE EXPLAINED AS MERELY AN ASPECT OF THE SUPREME COURT'S SUPERVISORY POWER OVER THE LOWER FEDERAL COURTS. ASSUMING THE CONTINUED VITALITY OF MAPP, WHERE DOES CONGRESS GET THE POWER TO LIMIT OR ABOLISH THE EXCLUSIONARY RULE?

(Answer): The exclusionary rule is a rule of evidence, not an integral part of the Fourth Amendment. It is a remedy for police abuse, and would still apply in those cases where abuse is evident. Congress is free to promulgate rules of evidence.

(Question): (2). DOES CONGRESS' POWER TO MODIFY THE EXCLUSIONARY RULE DEPEND ON THE EFFICACY OF THE ALTERNATIVE REMEDIES WE PROPOSE IN LIEU OF THE RULE? SPECIFICALLY, DO YOU BELIEVE THAT THE COURT IS MORE LIKELY TO SUSTAIN AN ABOLITION OF THE RULE IF WE REPLACE IT WITH WHAT WE BELIEVE TO BE AN ADEQUATE ALTERNATIVE?

(Answer): An alternative is unnecessary and unwarranted when an officer or agent acts in reasonable good faith. There is no act or omission to punish. Officers should not be punished for acting in good faith; they should be encouraged to do so. In addition, aggrieved victims of an unlawful search may bring a common law tort action against the officer or a civil rights claim in federal court if the federal agent has acted under color of state law. Additionally, the Federal Tort Claims Act was specifically amended to permit actions for unlawful searches following the Collinsville Raid.

Violent Crime and the Exclusionary Rule:

(Question): WHAT EVIDENCE, IF ANY, EXISTS TO INDICATE THAT THE EXISTENCE OF THE EXCLUSIONARY RULE IS A CONTRIBUTING FACTOR TO OUR NATIONAL CRIME RATE? DO YOU BELIEVE THAT A RESTRICTION ON THE RULE ALONG THE LINES SUGGESTED BY THE DEPARTMENT OF JUSTICE WILL HELP REDUCE CRIME? OR, DO YOU BELIEVE THAT THE REAL VALUE IN THE PROPOSED CHANGE IS A SYMBOLIC ONE — INCREASED PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM?

(Answer): Except for the Metropolitan Police of the District of Columbia, federal law enforcement has little effect on violent street crime, with the singular exception of narcotics seizures. However, many states are quick to follow the lead of Congress in enacting similar legislation, as they have done in fair employment and occupational safety laws. Truth in evidence is more than symbolic. It is an essential component of a judicial system that promotes justice and fairness.

Sanctions Other than the Exclusionary Rule:

(Question): (1). WHAT DISCIPLINARY PROCEDURES, IF ANY, DOES YOUR JURISDICTION NOW HAVE IN PLACE TO DEAL WITH OFFICIAL MISCONDUCT IN VIOLATION OF THE FOURTH AMENDMENT? IF SUCH PROCEDURES DO EXIST, HOW OFTEN HAVE THEY BEEN EMPLOYED? CAN PRIVATE CITIZENS INITIATE COMPLAINTS?

(Answer): Police departments throughout the nation solicit and investigate complaints of police misconduct. In many jurisdictions, Fire and Police Commissions and/or Civil Service Boards are authorized to accept citizen complaints. Citizens may also complain to their city council or county board; they can also complain to the mayor or county executive. Many states have human relations or civil rights commissions with enumerated sanctions.

(Question): (2). WHAT STEPS DOES YOUR JURISDICTION NOW HAVE IN PLACE TO EDUCATE ITS LAW ENFORCEMENT OFFICERS IN THE PERMISSIBLE SCOPE OF ACTIVITY UNDER THE FOURTH AMENDMENT? WHAT IMPROVEMENTS, IF ANY, DO YOU CONTEMPLATE IN THIS REGARD?

(Answer): Most states have minimum standards of training for law enforcement officers, which is often exceeded by larger police agencies that regularly deal with violent crime. Some states have certification procedures as well. The trend is certainly in the direction of increased and more professional training. Recently, for example, Illinois increased its statewide mandatory training requirement to over 500 hours for recruits. There is also a trend to support the costs of police training by diverting a portion of fines or court costs for this purpose.

(Question): (3). WHAT CIVIL TORT REMEDIES NOW EXIST FOR VICTIMS OF ILLEGAL SEARCHES IN YOUR JURISDICTION? WHAT IS THE TRACK RECORD?

(Answer): An AELE national survey of police misconduct litigation from 1972-77 indicated that 3.6 percent of all suits against state, county, municipal and federal officers and agencies alleged unlawful search and seizure. This is a relatively

small percentage of cases. Suits may be maintained in state or federal court, in most cases. Citizens may also sue in small claims courts, without having to employ counsel, for minor infractions.

(Question): (4). WHAT CONSIDERATION, IF ANY, HAS YOUR ORGANIZATION GIVEN TO IMPROVING (1) DISCIPLINARY PROCEDURES; (2) EDUCATIONAL TRAINING AND (3) TORT REMEDIES, AND MAINTAINING THE EXCLUSIONARY RULE IN ITS PRESENT FORM?

(Answer): (1) I have personally recommended that each state create a statewide organization to supervise police misconduct complaints and standardize disciplinary rules, fact-finding procedures and punishment. See Schmidt, "A Proposal for a Statewide Law Enforcement Administrative Law Council," 2 Journal of Police Science and Administration 330 September, 1974.

(2) AELE has operated 25 national workshops on police discipline and liability, since 1974. We also publish several periodicals dealing with these subjects, and thousands of law enforcement agencies subscribe to these. I also frequently speak on these topics at state and regional conferences.

(3) Existing tort remedies for injunctive relief, general, special and punitive damages are more than sufficient to deter the vast majority of officers from deliberate misconduct.

EFFECT OF EXCLUSIONARY RULE IN MARYLAND

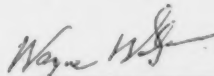
MARYLAND'S ATTORNEY GENERAL STEVE SACHS TOLD THIS SUBCOM-MITTEE:

In my state, Mapp has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. A former executive director of the 15 year old Maryland Police Training Commission attributes the increase in quality and quantity of training and education directly to the need to adjust to the exclusionary rule. Mapp, as he put it, has had "very positive effects." Some of the more striking improvements include:

- much longer training periods for new officers, especially courses about constitutional rights.
- many local jurisdictions have more than doubled the training time and now provide over 20 weeks of initial instruction.
- in-service training, virtually nonexistent before, is now emphasized.
- higher calibre of instruction, with some courses taught by law-trained college professors.
- training geared to practical situations such as stop and frisk exercises.
- testing constitutional law knowledge on promotional exams.

(Question): HOW HAS THE CALIFORNIA AND FLORIDA EXPERIENCE COMPARED WITH SACHS' COMMENTS ON MARYLAND'S.

(Answer): We would agree that the Exclusionary Rule has encouraged increased police training and educational entry requirements. However, we are not suggesting the abolition of the rule, merely an exception to it. We firmly believe that police and federal law enforcement agencies must have superior training as an element of their reasonable good faith defense.

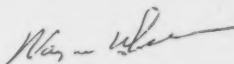


Wayne W. Schmidt

STATE OF CALIFORNIA

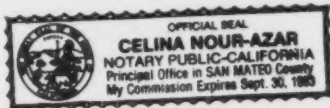
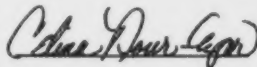
COUNTY OF SAN MATEO..ss

WAYNE W. SCHMIDT, being first duly sworn, upon his oath, deposes and states: I have read the foregoing questions and answers; I have replied in a truthful manner based either on personal knowledge or on information and belief; I hereby consent to my answers being incorporated into or appended to my earlier testimony on February 22, 1982, before the Senate Subcommittee on Criminal Law, and I consider these answers to be a continuation of such testimony, if the Chairman of such Subcommittee, in his discretion, desires to incorporate or append these answers as if personally given under oath as a part of my earlier testimony.



Wayne W. Schmidt

Subscribed and sworn to before me this 14 day of May, 1982.

VALOR (VICTIMS' ASSISTANCE LEGAL ORGANIZATION) Formerly:
CRIME VICTIMS LEGAL ADVOCACY INSTITUTE, INC.

SUITE 9, F & M BUILDING, 210 LASKIN ROAD, VIRGINIA BEACH, VIRGINIA 23451

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April 26, 1982

804-422-2692
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Senator Charles McC. Mathias, Jr.
 Chairman
 Senate Judiciary Subcommittee
 on Criminal Law
 United States Senate
 Washington, D.C. 20510

Dear Senator Mathias:

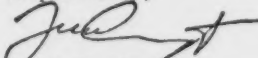
Thank you for your letter of April 14th and for apprising me of the introduction of Senate Bills 2231 and 2304.

As I testified before your Subcommittee, I am in favor of a "good faith" modification of the Exclusionary Rule. The Attorney General's Task Force on Violent Crime, on which I had the honor to serve, specifically recommended such a modification as is contained in S. 2231 and S. 2304. I wholeheartedly endorse both bills.

I particularly like the language in S. 2304 which would bar the exclusion of evidence if it would "...constitute a grave miscarriage of justice". I believe that this provision speaks to one of the main reasons why the Rule has come under criticism; namely, true emergency situations: e.g. terroristic crimes, hostage emergencies, exigent circumstances, and so on, in which the police must take action without a good deal of time to work out the niceties of search and seizure law.

With thanks for your consideration in asking for my opinion, I am,

Respectfully,



Frank Carrington
 Executive Director

cc: Hon. Strom Thurmond
 Hon. Dennis De Concini
 Hon. Orrin Hatch

University of Illinois at Urbana-Champaign

COLLEGE OF LAW · 209 LAW BUILDING · 504 EAST PENNSYLVANIA AVENUE · CHAMPAIGN, ILLINOIS 61820 · (217) 333-0931

April 27, 1982

The Honorable Charles McC. Mathias, Jr.
United States Senator
Subcommittee on Criminal Law
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Mathias:

I have your letters of March 31 and April 14. With respect to the latter, I have examined S. 2231 and S. 2304 and find that these "good faith" proposals suffer from the defects I described in my testimony and prepared statement, and thus I would strongly urge your Committee not to act favorably on them. S. 2304 is the worst of the two, for it contains the added prohibition on exclusion when "such evidence would constitute a grave miscarriage of justice." That phrase, of course, is absolutely meaningless in this context and would leave judges free to disregard the Fourth Amendment at their whim. I would add that the least subtle aspect of both of these bills is the effort to rewrite the recent Franks decision of the Supreme Court so as to make it cover only intentional misrepresentations. It is hard to believe that this was accidental, and thus I find it rather revealing of the spirit in which these two bills have been drafted and offered.

With respect to your letter of March 31, and in particular the series of questions attached thereto, I believe that my earlier testimony and prepared statement adequately presents my views on most of these questions, and thus some very brief responses should suffice here.

As for the objective-subjective test: On question I, unquestionably a subjective and objective test would have to be utilized in all circumstances. And, for the reasons I gave earlier, it would not even suffice that the particular officer subjectively acted in good faith and that it was reasonable for him, individually, to have the belief he did. On question II, I would point out again the attempt to undercut the Franks rule. Apart from that, I would acknowledge that the best case for a good faith exception could be made if it were limited to with warrant situations. Though those situations are few in number, the argument is that such a rule would encourage police to go the warrant route more often. But, for the reasons indicated in the material I have already supplied the Committee, on balance I doubt the wisdom of a good faith rule even drawn this narrowly. As for question III, it is nothing short of nonsense to talk of a reasonable belief that

The Honorable Charles McC. Mathias, Jr.

April 27, 1982

Page 2

There is probable cause, for the probable cause standard itself takes into account reasonable mistakes of fact. If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is. As for the Schmidt proposal, it is a rather blatant effort to rewrite the Fourth Amendment by substituting reasonable suspicion for probable cause, for that would be the effect of his proposal. Apparently that is the intended effect, for his testimony makes the point that police could learn from the decided cases what the reasonable suspicion standard means and thus would know how far they dare stray from the probable cause test. As for question IV, the criticism by Justice Stewart is certainly sound.

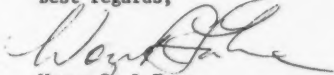
As for case support for the good-faith exception: Those Supreme Court opinions do not support adoption of a good faith exception, but rather establish that the kinds of good faith which should be taken into account are already taken into account. In other words, they show why legislation of the kind proposed is not needed. Ybarra fully supports a major theme in my testimony, which is that Fourth Amendment violations by the system are not excusable simply because the officer in the particular case was not in a condition to be deterred.

As for the kind of proceedings in which the rule would apply, I would say that if the good faith test made any sense it should apply in all situations in which the exclusionary rule would otherwise apply. But because in my view the test is neither constitutional nor sound as a policy matter, it should not be applicable in any proceedings.

As for how the good faith exception would operate, I refer you to the dire consequences described in my testimony. Given the wide-ranging inquiry which would be necessary to determine whether there was systemic good faith, the court backlog would likely grow because suppression hearings would now be longer than ever. As for burden of proof, unquestionably the burden would have to be on the government; it would be impossible for a defendant to show bad faith except under the most rare circumstances.

As for the premium on ignorance inquiry, I strongly disagree with the Department's assertion for the reasons spelled out in my testimony. As for whether any good faith exception would ultimately be engrafted onto other constitutional guarantees, I do not know whether this would occur, but would not be surprised if many proponents have this hope. As for the relevant and reliable evidence inquiry, I would simply note that many longstanding constitutional and evidentiary rules properly stand in the way of a system in which ascertainment of truth at all costs is the guiding principle. As for the inquiry concerning the tort remedy, I agree fully with the argument presented.

Best regards,



Wayne R. LaFare
Baum Professor of Law

WRL/mm

1909 K STREET, N.W., SUITE 400
WASHINGTON, D.C. 20006

GARY P. HAYES
EXECUTIVE DIRECTOR

1982 MAY -3 PM 3:12

(202) 466-7820

POLICE EXECUTIVE
RESEARCH FORUM

April 30, 1982

The Honorable Charles McC. Mathias, Jr.
Chairman
Senate Judiciary Committee
Subcommittee on Criminal Law
United State Senate
Washington, D.C. 20510

Dear Senator Mathias:

The members of the Police Executive Research Forum appreciate this opportunity to comment on the two recently introduced bills, S. 2231 and S. 2304, which amend the exclusionary rule in federal proceedings. Both these pieces of proposed legislation attempt to modify the exclusionary rule by placing a limitation of police officer good faith upon its application. The rationale posited for such a limitation is that police officers cannot be deterred from behavior which is carried out in a good faith belief that their conduct is in conformance with Fourth Amendment requirements; to exclude the evidence in such a circumstance, it is alleged, provides a windfall to criminal defendants, while undermining public confidence in our criminal trial process.

The purpose behind the exclusionary rule is to deter law enforcement from committing constitutional violations. The failure of S. 2231 and S. 2304, as well as the other proposed legislation regarding the exclusionary rule, is that they do not redirect the rule's application in a manner in which its deterrent objective can most effectively be met. The focus of the "good faith" standard remains the individual officer. It fails to address the most important consideration for devising a remedy for Fourth Amendment violations: law enforcement executives' assuming the responsibility for their officers' violations. This is the only way to ensure, with certainty, that constitutional violations are minimized.

The good faith test uses the subjective intent of individual officers to determine when the exclusionary rule will be applied. This will not only make the exclusion process more difficult, but could also lessen law enforcement agencies' attention to proper Fourth Amendment procedures. In applying the rule under the good faith test, judges will be given the difficult task of examining the inner thought process of officers to determine their true intent. More important, dependence on discerning the subjective intent of officers could lead to departmental toleration of officer ignorance and provides no incentive for the development of departmental procedures to guide officers regarding proper behavior.

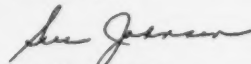
In contrast, a test of the good faith efforts of police department administrators is susceptible of objective measure. As I demonstrated during the course of my testimony before your Subcommittee on March 16, 1982, the alternative developed by the Police Executive Research Forum provides the necessary means of testing police administrators' good faith efforts through the assessment of departments' rules,

training and disciplinary history. Our substitute process provides for an objective test by which departmental efforts to eliminate unconstitutional violations can be gauged. In addition, our proposed alternative both removes the disincentive and provides the incentive for police administrators to adopt programs which will effectively deter police officer violations. Once departments have proven they have done so under our proposed objective test, the exclusionary rule will not be applied: evidence will be used while at the same time the constitutional rights of individuals will be effectively safeguarded.

Both S. 2231 and S. 2304 attempt to provide an objective measure for determining the application of the rule by adding the requirement that the good faith belief of the officer be "reasonable". However, neither bill defines the standards by which this reasonable requirement is to be measured. Some who advocate this good faith modification have stated that, to meet the reasonable requirement, an officer's police department must have promulgated rules and regulations outlining Fourth Amendment procedures, implemented programs to train the officers in those rules and regulations, and maintain a system for disciplining officers who violate their rules. These statements give us only moderate assurance, however; we are not confident that the judiciary will hold that these same standards are part of the reasonableness requirement. What is needed, instead, is explicit reference in the legislation itself that the test to determine whether an officer's good faith belief is reasonable depends upon whether the officer's department has a program consisting of the three elements: rules, training and discipline. If these three elements are defined in the legislation as the test of reasonableness, then our objective of placing responsibility for deterring constitutional violations upon police administrators will be met. Without such detail, we fear the nebulous standard of "reasonable" will be subject to ambiguous interpretation by judiciary. The result may lead to use of a subjective standard alone as the test of good faith. In that event, the focus of the exclusionary rule will remain upon the individual officer; the opportunity to increase law enforcement agencies' attention to proper Fourth Amendment procedures will be lost.

Again, Senator Mathias, thank you for seeking the input of the members of the Police Executive Research Forum on this very important issue. If we can be of any additional assistance to you in the future on this or other matters before your Subcommittee, please do not hesitate to call upon us.

Sincerely,



Sue M. Johnson
Deputy Director

SMJ/jeb



AMERICAN BAR ASSOCIATION

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May 3, 1982

Honorable Charles McC. Mathias, Chairman
Subcommittee on Criminal Law
Judiciary Committee
United States Senate
358 Russell Senate Office Building
Washington, DC 20510

Dear Mac:

This is in response to your April 14 letter requesting
comments on two newly-introduced exclusionary rule bills—
S. 2231 and S. 2304.

The American Bar Association opposes both pieces of legisla-
tion, and urges your Subcommittee not to report either bill.

Let me spell out the reasons for this view. The ABA joins
the Administration and others in desiring to combat the critical
problem of crime in this country. Changes in the exclusionary
rule, however, will not cause any drop in our nation's crime
rate. The proposed exclusionary rule changes would only be
effective in catching the headlines — not the criminals.
All the available empirical studies indicate that the exclu-
sionary rule results in few cases being lost. The Institute
for Law and Social Research, for example, found in a study
of state prosecutions that "less than 1 percent of all arrests
were refused by the prosecutor with an indication that the
police failed to protect the arrestee's right to due process."
A General Accounting Office report in 1979 confirmed a parallel
finding on the federal level: that the rule has but a minuscule
impact on conviction rates.

Two additional points are worth noting. First, the proponents
of the legislation have failed to offer any empirical data to
demonstrate a connection between the exclusionary rule's
existence and the crime rate. Second, it appears that the
U.S. Department of Justice itself must have some doubts —
it is about to fund a research study, through the National
Institute of Justice, to examine the impact of the rule! It is
curious that a time it is raising these questions for academic
study, on the one hand, that it is firmly asserting that
changes in the rule are essential, on the other.

Let me turn to the provisions of each bill. S. 2231, proposed
by the Administration, would create a "good faith exception"
to the rule. The U.S. Supreme Court over the past 100 years
has consistently rejected this test. Further, passage of
S. 2231 would mean abandonment of the objective standard by

which courts for 67 years have scrutinized the admissibility of evidence. It would be replaced by a subjective "good faith" test. Federal law enforcement officers would be permitted to testify not only as to their state of mind, but probably to give opinion testimony, as well. It would put a premium on ignorance of the law, reversing the trend toward enhancement of law enforcement professionalism which we have seen in recent years.

Further, the "good faith" test would wreak havoc on the administration of criminal justice in this country. At a time when we are trying to reduce court costs and delays, introduction of a new "good faith" exception test will trigger years of litigation, as courts are forced to throw out well-developed case law and sort out what the new test means.

Additionally, we would be destroying any semblance of uniformity in Fourth Amendment decisional law in federal and state criminal proceedings, by creating a lesser standard in federal courts. It would exhumate the "silver platter" doctrine: State prosecutors would be free to hand over to the Justice Department illegally seized evidence for use in federal prosecutions.

S. 2304 would go even further. In addition to a "good faith" exception, it would permit admission of evidence if to do otherwise would "...constitute a grave miscarriage of justice." But what does that "standard" mean? Arguably, it would cover any situation in which the defendant would be found guilty if the evidence were admitted. If so, is this not simply a backdoor route to abolishing the rule altogether?

The desire to adopt "easy" solutions to the nation's crime problem will only result in abandonment of constitutional protections. This would not only set a dangerous precedent, but at the same time have virtually no impact on the crime rate.

I appreciate the opportunity to comment on this legislation on behalf of the American Bar Association. Let us know if we can be of any assistance to you or your staff.

Sincerely,

Bill

William W. Greenhalgh
Chairperson, Legislation
Committee, ABA Section of
Criminal Justice

cc: Members, Subcommittee
on Criminal Law



DEPARTMENT OF LEGAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL

THE CAPITOL

TALLAHASSEE, FLORIDA 32304

JIM SMITH
 Attorney General
 State of Florida

May 4, 1982

Senator Charles Mathias
 Chairman, Subcommittee on Criminal Law
 162 Russell Building
 Washington, D. C. 20510

Re: §1995, 751 and 101, Exclusionary Rule

Dear Senator Mathias:

This is to acknowledge receipt of your recent inquiry pertaining to the above legislation presently pending before your subcommittee and my testimony given on March 16, 1982, relative thereto.

There is no doubt in my mind that whether an officer has acted in "good faith" in a given case would be based upon an objective assessment of his conduct together with the actual or subjective intent of the officer. The legislation contemplates that there be a reasonable basis for that belief and that would require the actions in a given case be measured against principles of law in effect at the time the search and seizure took place. No one could seriously suggest that the self-serving declarations of law enforcement officers would itself establish a basis for admitting evidence taken during a search which all would agree was clearly illegal. Such a standard would render the Fourth Amendment meaningless and unenforceable.

I wish to add, however, that the subjective intent of an officer should not be a factor where the search and seizure is made pursuant to a warrant. An officer who is executing a search warrant issued by a magistrate is merely carrying out a judicial directive. In my view, suppression of evidence seized pursuant to a judicial warrant should not occur, unless it is executed improperly or the warrant is predicated upon an affidavit containing intentional misrepresentation. This is because the purpose of the exclusionary rule is to deter police misconduct. If there is a technical error by the issuing judge or his legal judgment pertaining to the existence of probable cause is subsequently found erroneous, that is a judicial error not police misconduct. See: *United States v. Hill*, 500 F.2d 315 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). The entire history of the exclusionary rule has been to encourage law enforcement officers to secure prior judicial approval before conducting a search and seizure. When officers do so, a technical error committed by the judicial officer in issuing the warrant ought not be classed as police misconduct and overzealousness. This is why the legislation correctly and properly presumes that searches conducted under the authority of a warrant is done in good faith.

I agree that if the facts known to a police officer were insufficient to support a stop and frisk under *Terry v. Ohio*, 392 U. S. 1 (1968), there would not be a basis to conclude that objectively the search and seizure was made in good faith. Quite frankly, any contention that the good-faith exception would be tantamount to abandonment of the constitutional requirement of probable cause is untenable. First, the constitution forbids "unreasonable" searches and seizures and "probable cause" refers to the issuance of a warrant. Not all warrantless searches and seizures are unreasonable. More importantly, however, is that

our courts are constantly differentiating between the existence of probable cause and reasonable suspicion and would continue to do so in the future. There is a sufficiently clear distinction between the two doctrines so that judicial officers could measure the reasonableness of the police officer's actions. Lastly, just because there is a sufficient basis to authorize a Terry-type stop and frisk that does not necessarily mean that the search and seizure was, in fact, done in good faith.

Of course, warrantless searches of homes are unreasonable per se under *Payton v. New York*, 445 U.S. 573 (1980), and therefore, I cannot conceive that the "good-faith" test would have any impact on searches of dwellings, except where the evidence suggests there were exigent circumstances precluding issuance of a warrant. In cases where the existence of exigent circumstances are alleged to be the basis of the warrantless search, the present law contemplates that the evidence be viewed in light of the knowledge available to the officer at the time in question and those cases generally do not present a law enforcement problem.

I agree with the Department of Justice that a search made pursuant to a warrant should be presumed to have been conducted in good faith, except where there has been an intentional misrepresentation of fact contained in the affidavit and have no objection to the inclusion of language which would make that clear. I do not, however, believe that is necessary because it is inconceivable that anyone could or would argue that a deliberate misrepresentation of a material fact in an affidavit could be found to be an act of good faith.

I disagree with Professor Kaplan's criticism because it is predicated on an assumption that police officers invariably commit perjury and that trial judges, presumably both state and federal, are incapable of faithfully executing the law. My experience and that of members of my staff find that simply is not the case. It is undeniable that there are officers who have and will commit perjury like any other witness, but if they are inclined to do so at trial or in a pretrial suppression hearing, they would have no hesitancy in doing so in an affidavit. Perhaps if officers were given a little "breathing room" and due consideration for honest mistakes, there would be less motive to color their testimony. Professor Kaplan, with no disrespect intended, knows full well that the self-serving testimony of an officer that he acted in good faith is not going to bind a trial judge where the evidence shows otherwise. The fact that proof to the contrary would be difficult is irrelevant unless we are to presume every law enforcement officer perjures himself, and I for one will not engage in such an assumption. It could be argued that it is difficult to prove an officer is lying because most do not commit perjury. They simply do the best they can under very difficult circumstances.

I do not believe there is any doubt that the Congress has the authority to enact the legislation in question. In *Stone v. Powell*, 428 U.S. 465 (1976), the United States Supreme Court recognized that the exclusionary rule is not constitutionally based. Indeed, if it were, the decision rendered by the United States Court of Appeals, Fifth Circuit, in *United States v. Williams*, 622 F.2d 830 (5th Cir.1980), cert. denied, *Williams v. United States*, 449 U.S. 1127 (1981), could not be sustained for in that case the court adopted the "good-faith" exception to the exclusionary rule. Moreover, the Supreme Court itself has recognized the relevance of good faith on the part of officers in determining whether to suppress evidence. See: *Michigan v. DeFillippo*, 443 U.S. 31 (1979), cited to in the *Williams* case, *supra*, at 842, note 5.

In *United States v. Watson*, 423 U.S. 441 (1976), the Supreme Court cited to and relied upon an Act of Congress, which authorized a warrantless arrest upon probable cause, as evidence that such arrest (seizures of persons) was not unreasonable. There is no question in my mind that the Court would give due deference and consideration to the Congress' judgment in this

area. It goes without saying that the validity of the act can only be decided by that Court.

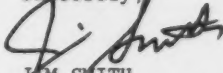
While there is no concrete evidence that the exclusionary rule as it presently exists contributes to the high crime rate, I am firmly convinced that it has done so and will continue to do so. Many arrests and searches are not effected by officers even though such arrest would be valid. They are told, "When in doubt--don't." This obviously has an adverse impact because most arrests and many searches involve judgment under very trying circumstances and it can truly be said that none are free from doubt. In short, while we do know about the "illegal" searches and seizures, we have no way of knowing the number of arrests, or searches and seizures that were not made but could have been. I do not believe the legislation before the Committee can be fairly catagorized as merely symbolic. It will avoid the release of those convicted of crime, place the exclusionary rule in proper perspective and increase public confidence in the criminal justice system.

Local sheriffs and chiefs-of-police have internal disciplinary procedures designed to reduce official misconduct which are utilized due to the fact that improper police conduct frequently results in poor community relations and/or civil liability to the governmental entity. The latter may be as a result of a suit filed in the state courts under common law doctrines or in federal court pursuant to 42 U.S.C. §1983. In fact, there are indications that potential civil liability has caused greater scrutiny and oversight by supervisors than the suppression of evidence ever did.

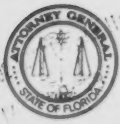
I can say that in Florida we have numerous programs designed to familiarize law enforcement officers with the ever changing standards of law pertaining to arrests, search and seizure and interrogation of persons taken into custody. My office regularly sends attorneys who specialize in the criminal law to speak to law enforcement officers on these subjects and this has been done for the last ten years. Local state attorneys likewise hold seminars at the local level on a regular basis. The staff of the criminal division of my office is on call day and night for any law enforcement officer in the State of Florida for advice and consultation on such matters. The obvious reason is that this reduces the number of errors committed in the first instance and saves considerable amounts of money in the long run. It should be observed that these activities while desirable and necessary cannot solve the problems of honest mistakes that are bound to take place for officers can and will make mistakes. It is also obvious that policemen cannot be in class constantly listening to lectures from attorneys on the latest decisions on the subjects they necessarily deal with each and every day. They are needed on the streets where their mere visibility reduces the incidence of crime.

I sincerely appreciate this opportunity to respond to your questions, which I found quite pertinent to the issue at hand. I hope this response proves helpful to you and your subcommittee, and that the subcommittee will act favorably on the legislation before it.

Sincerely,


JIM SMITH
ATTORNEY GENERAL

JS/RM/rb



DEPARTMENT OF LEGAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL

THE CAPITOL

TALLAHASSEE, FLORIDA 32304

JIM SMITH
Attorney General
State of Florida

May 11, 1982

Senator Charles Mathias
Chairman, Subcommittee on Criminal Law
358 Russell Building
Washington, D. C. 20510

Dear Senator Mathias:

This is to acknowledge receipt of your letter of April 14, 1982, requesting my comments on S.2231 and S.2304.

As you know from my testimony before the Subcommittee on Criminal Law and my letter to you dated May 4, 1982, the National Association of Attorneys General and I strongly support modification of the exclusionary rule as it presently exists and recommend adoption of the good-faith test to determine the admissibility of evidence in a criminal proceeding. This, of course, is what S.2231 and S.2304 are designed to do.

There is only one difference between S.2231 and S.2304, and that is that under the latter, illegally obtained evidence would be admissible "... if to exclude such evidence would constitute a grave miscarriage of justice. ..." Literally read, evidence illegally seized whether in bad faith or by resorting to misrepresentation by law enforcement officers would nevertheless be admissible. Neither the National Association of Attorneys General nor I have recommended this concept and in all candor such an approach could have serious constitutional overtones. *Franks v. Delaware*, 438 U.S. 154 (1978). More importantly, it is my opinion that the inclusion of this additional exception would lessen the likelihood that the Supreme Court of the United States would give due consideration to Congress' judgment that the exclusionary rule should be modified. See and compare *United States v. Watson*, 423 U.S. 441 (1976) and *Payton v. New York*, 445 U.S. 573 (1980).

Having considered S.2231 and S.2304, I wish to state my continued preference for S.1995. My preference is predicated on the fact that S.1995 has objective standards and criteria which will aid judicial interpretation of the legislation. Having no such standards, S.2231 and S.2304 could produce contradictory holdings by the various courts. Moreover, neither S.2231 nor S.2304 provides for civil remedies which I feel should be included in any legislation on this subject.

I appreciate the opportunity to express my view of these proposals and hope my comments prove helpful to you and the subcommittee.

Sincerely,

J. Smith
Jim Smith
Attorney General

JS/RM/rb

cc: Joel Kanter, Special Assistant
National Association of Attorneys
General

THE
CATHOLIC UNIVERSITY
OF AMERICA
WASHINGTON D.C. 20064

DEPARTMENT OF POLITICS
202 635-5128

May 11, 1982

The Honorable Charles McC. Mathias, Jr.
United States Senator
Subcommittee on Criminal Law
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 2231 and S. 2304

Dear Senator Mathias:

I am responding to your recent letter asking that I review two bills, S. 2231 and S. 2304, and that I provide the Subcommittee on Criminal Law with my comments on them.

Both of these bills follow the "good faith" approach to the exclusionary rule recommended by the Attorney General's Task Force on Violent Crime. In my testimony before you and the Criminal Law Subcommittee on October 5, 1981, I explained in some detail why I think that abolition of the rule, along with establishment of a civil tort remedy and independent review of suspected misbehavior by law enforcement officials, would be substantially preferable to the "good faith" approach. I refer you to that testimony.

In addition, Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia has an excellent discussion of the numerous and serious deficiencies of the "good faith" approach in his Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule, published in 1982 by The National Legal Center for the Public Interest (pp. 35-36). For your information, I have enclosed the relevant pages of that monograph.

S. 2304 provides that evidence which is otherwise admissible shall not be excluded if such exclusion would result in "a grave miscarriage of justice." The difficulty with this provision is that no definition is given as to what would constitute "a grave miscarriage of justice." This provision would undoubtedly spawn years of trial and appellate litigation as to what is meant by "a grave miscarriage of justice;" such litigation would be superimposed on the many years of copious and confusing case law already on record. As new litigation unfolded, the phrase "a grave miscarriage of justice" would provide trial and appellate judges little or no guidance as to when exclusion should not take place.

I appreciate this opportunity to provide you and the Subcommittee with my thoughts concerning S. 2231 and S. 2304.

Sincerely,

Steven R. Schlesinger

Steven R. Schlesinger
Associate Chairman and
Associate Professor

SRS:jd

Enclosures 2

[From: Wilkey, Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule]

Since the conduct of the officer would be handled in a proceeding separate from the trial of the accused, presumably it would get more careful scrutiny, and the decision of the court on this would serve as a more adequate guide to the police (B). Of course, with this mini-trial as a substitute for the exclusionary rule, the criminal will go to jail, irrespective of the constable's blunder (C). And, a mini-trial by the same court and jury (if a jury was employed in the principal case and the officer wants one) which heard the evidence in the original case is precisely the type of proceeding to introduce comparative values into the system of discipline, to replace the present totally inflexible penalty (E). The court's judgment on the infraction of the officer should reflect community values as to the standard of conduct expected of the police and as to the type of disciplinary punishment police should receive when they violate the standard. This would make the Fourth Amendment protection against unreasonable searches and seizures much more of a practical reality (F).

5. The "Good Faith" Exception

Like most other products of a committee, the Attorney General's Task Force recommendation on the good faith exception smacks of a compromise between the admittedly intolerable situation we have and the remedy truly necessary to correct it. Unlike many compromises, this one is the kind of compromise which may be as disastrous as trying to make the Grand Canyon in two jumps. The jumper is rarely able to summon the effort to make the second hop.

The proposed remedy has a certain plausibility, and it will have one favorable result: fewer guilty criminals will be set free by the application of the exclusionary rule. However, the guilty going free because the constable blundered is only the most visible of the many evils associated with the exclusionary rule. There are also evils which in the aggregate are greater than sometimes freeing the guilty criminal, *and each and every one of these is preserved by this proposed "remedy."*

Looking back at the list of existing evils in Part I above, it is clear that only the first evil will be partially corrected by the adoption of the good faith exception. *Each and every one of the other eleven listed evils will be retained after the proposed good faith exception remedy goes into effect.* For example, the good faith exception does not purport to give innocent victims of illegal searches and seizures any remedy at all; only the truly guilty will continue to benefit by the exclusionary rule (Cost 2). All internal disciplinary efforts of law enforcement agencies will be totally negated by the continued retention of the exclusionary rule in any form (Cost 3). The necessity to determine whether the officer acted in "good" or "bad" faith makes im-

possible any effective disciplinary remedy by either law enforcement agencies or outside review boards. Discipline of the officer will always undermine the prosecution of the case, if there remains any chance that the search can be found sufficiently illegal to invoke the exclusionary rule. The burden on the court is in no way lightened; it will still be necessary to determine in every criminal trial whether the officer acted in "good" or "bad" faith (Cost 4). This is now and will continue to be an unabated waste of judicial resources (Costs 5 and 6). The necessity of determining good or bad faith will be an outright encouragement to perjury, even as now (Cost 7); similarly, the retention of the rule for "bad faith" searches makes hypocrites out of judges (Cost 8). We could go down the list of remaining evils listed and see that each and every one would still be present if the proposed good faith exception is adopted.⁴⁹

In addition to perpetuating the present evils, the proposed good faith exception will create two additional evils:

Cost 13: The "good faith" exception puts a premium on ignorance and lack of training in law enforcement agencies. The ideal police recruit will be the "noble savage" who never heard of the Constitution. He will be able to do many illegal things in perfect "good faith."

Cost 14: After having been condemned for 67 years as an aberration in the judicial system, the exclusionary rule will finally be enshrined by legislation. Once the "good faith" exception rule is adopted, we will have the "bad faith" exclusionary rule with us at least for the lifetime of those of us concerned with it now.⁵⁰ As I said above, in making the Grand Canyon in two jumps, it is always the second hop that is the most difficult.

C. Statutory Correction

There are proposals in Congress to provide for strict internal discipline of federal law enforcement agencies for Fourth Amendment violations, and to provide a meaningful tort remedy against the Federal Government itself for all or only the innocent who are victimized by illegal searches and seizures.

My own conclusion is that the ideal statutory solution would be a measure which does three things. First, it should create an indepen-

⁴⁹Cost 11, lack of proportionality in regard to the officer's conduct, will be somewhat mitigated. Failure to consider whether the officer acted in good faith is one of the factors now demonstrating the arbitrariness in the inflexible application of the exclusionary rule. Taking the officer's good faith into account does reduce the arbitrariness of the total application of the rule.

⁵⁰The number of guilty going free will be reduced (there is enough "good faith" among the officers to justify this), but since the other evils of the rule are not so obvious to the layman as to evoke strong protest, the impetus for reform will have been lost.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEYCHAMBERS OF
HERBERT J. STERN
JUDGEUNITED STATES COURT HOUSE
NEWARK, N. J. 07101

May 12, 1982

Honorable Charles McC. Mathias
Chairman, Subcommittee on Criminal Law
Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

I received in the mail a pamphlet entitled "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," authored by Judge Malcolm Wilkey of the United States Court of Appeals for the District of Columbia Circuit, and apparently sent to every federal judge by the National Legal Center for the Public Interest. The introductory remarks to this publication make it plain that your subcommittee is presently considering legislative alternatives to the exclusionary rule and that Judge Wilkey's monograph is part of an effort to persuade Congress to overrule the exclusionary rule by legislation, and to persuade members of the legal community to join with them in urging the Congress to do so.

In this regard, Judge Wilkey emphasizes his view that the exclusionary rule is a "judge-made rule of evidence" and that "[t]he Supreme Court has never held that this rule is required by the constitutional provision it is designed to support." The plain suggestion of these statements is that the Congress may overrule the exclusionary rule by legislation without running afoul of constitutional requirements. I must confess to some amazement that such a legal position would be taken by an eminent legal authority.

The simple truth is that in 1914 the Supreme Court of the United States in Weeks v. United States, a unanimous opinion, ruled that the Fourth Amendment required the exclusion from federal courts of unconstitutionally obtained evidence. That decision has been reaffirmed repeatedly and by every Supreme Court opinion during the past 78 years. Even Wolf v. Colorado, cited by Judge Wilkey with such approval, in refusing to impose the exclusionary rule upon the states, reaffirmed it as a constitutional requirement within the federal courts. In any event, no one can doubt that Mapp v. Ohio, decided in 1961, required the states to exclude unconstitutionally obtained evidence from their courts as a matter of constitutional command under the Fourteenth Amendment. No

lobbyist for change, no matter how distinguished, can obscure the simple truth that for these 21 past years, the courts of the nation have required the courts of the states to exclude unconstitutionally obtained evidence and that this was done, and could only have been done, by a determination that the Constitution required it. The self-evidence of this truth is even plainer when one remembers that unless the exclusionary rule was a constitutional requirement, the Supreme Court would not have had the power to "impose it" upon the states.

Of course there is controversy today about the wisdom of the decision to construe the Constitution in this way. But then there has always been controversy surrounding this subject. It may even be that at any given moment a majority of the Supreme Court may feel as Judge Wilkey apparently does, that the previous constitutional rulings have been unwise and should be changed. Be that as it may, it is one thing for the Supreme Court of the United States to overrule its own prior decisions as to what the Constitution requires -- it is quite another for the Congress to attempt to do so by legislation. If Judge Wilkey and others are correct in the view that the Supreme Court of the United States was wrong in 1914 and wrong again in 1961 in its construction of the Fourth and then the Fourteenth Amendments, there is ample opportunity for redress within the constitutional framework; they need merely persuade the Supreme Court of the United States to change its mind. An appeal to the Congress to overrule constitutional decisions of the Supreme Court by legislation is simply out of bounds.

If these were my only concerns it is not likely that I would have taken your time in communicating with you for there are others more scholarly and better able to articulate the constitutional pitfalls in attempting the course which Judge Wilkey has suggested. But in his monograph, Judge Wilkey has also argued that the accumulated experience with the exclusionary rule demonstrates that it has been a failure; that is, that it does not deter police misconduct and in fact impedes other more effective means of accomplishing that goal. Recognizing that Judge Wilkey has an impressive background in law enforcement, I am concerned that silence in the face of such statements by others with experience in the criminal justice system may betoken consent.

I have spent my entire career working within the criminal justice system. Immediately after graduating from law school in 1961 I was appointed an Assistant District Attorney under Frank S. Hogan, District Attorney of New York County in New York City. I served there until October of 1965, when I became a trial attorney with the Organized Crime and Racketeering Section

of the Criminal Division of the United States Department of Justice. In 1969 I became Chief Assistant United States Attorney for the District of New Jersey, and in 1971 I was sworn in as United States Attorney for the District of New Jersey. I think I can fairly say that I have experience in law enforcement at every level.

In the District Attorney's Office, I spent my first year hearing and investigating citizen complaints, hand-in-hand with detectives of the District Attorney's Office Squad. Later, I spent nearly two full years in the homicide bureau, going to police stations and supervising homicide investigations even before arrests were made. Throughout my career in the Department of Justice, a great part of my time was spent not merely in the preparation and presentation of matters in court, but in the investigation and uncovering of criminal wrongdoing in the business community and among public officials. In the course of these efforts, I worked closely, and for many years, with agents of the Internal Revenue Service, the Federal Bureau of Investigation, the Labor Department, and many other agencies. I could, if it were necessary, give you a list of those who were indicted and convicted as a result of these investigations, but it is not my purpose to extol the office of which I was a member, rather to demonstrate that I have first-hand knowledge concerning the subject at hand.

There is no doubt in my mind that the exclusionary rule does in fact deter law enforcement misconduct at every level. It is simply incredible to suggest that the police, the FBI, the District Attorney and the United States Attorney are impatient, uncaring, or ignorant of the search and seizure rules hammered out in our courts. It is, I think, a slander to suggest that our law enforcement authorities are either so stupid or so uncaring that they are unaffected or -- if you will -- undeterred by what the courts say they must do, and what they must not do.

It is commonplace in this business for police departments to maintain large and well-staffed offices of legal counsel whose functions include keeping ordinary patrolmen up to date concerning changes in this area of the law. Rookie policemen undergo extensive training courses which concern themselves with the requirements of the Fourth and Fifth Amendments. Of course mistakes are made. Then, too, there are acts of deliberate lawlessness, even among those who are the guardians of the law. But in my experience the mainstream of our law enforcement people are concerned, aware, and do attempt to conform their conduct to the requirement of law, precisely because they know that if they do not it will profit them nothing. They will lose the fruit of their legal transgressions. The evidence will be suppressed.

I have seen firsthand, in case after case, warrents sought -- out of concern for the integrity of the investigation -- and various proposed conduct put aside, for fear of prejudicing the case. It is simply fantastic to suggest that the exclusionary rule does not impact on the way the police conduct themselves.

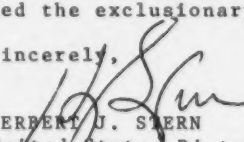
One could point to specific cases, like Delaware v. Prouse, which determined that police may no longer randomly and without cause stop cars upon the highway for a license and registration check. These kinds of cases have made an impact. Lest there be any doubt about it, turn to any TV thriller and watch the hard-bitten detective read the Miranda rights from a card to the recently-captured villain. Why does he do it? It is because the courts have ruled that he must and because he knows that if he does not, the confession will be suppressed. It is not, as Judge Wilkey suggests, that we suppress confessions only because they are unreliable. Miranda violations have nothing to do with direct coercion -- that was outlawed decades ago by Brown v. Mississippi, and its progeny. We suppress the fruits of Miranda violations because we have determined that the police are constitutionally required to give these or equivalent warnings and we enforce that requirement by depriving the interrogator of the fruits of his violation of the rules, irrespective of duress or unreliability.

In the end, of course, every person must decide for himself or herself what kind of a society we have, and want. As far as I am concerned, we live in a better and freer society today than we did 20, 60, or 80 years ago. In large part this is true because we are, as a people, freer from police misconduct and overreaching than we have been in any time in this century.

For those who agree with me, the specter of turning back the clock, of reintroducing the kind of routine police practices of days gone by, is simply horrifying. You will never deter crime that way -- and in fact stand a fair chance of encouraging it by example.

Of course we are beset by crime today. But every generation has had to face that same problem. It was true before there was an exclusionary rule. It will remain true even if the rule is abolished. Finally, as for the alternative remedies suggested by Judge Wilkey to curb police misconduct, all of them were on the books in one form or another and in one place or another in 1914 when Weeks was decided, and certainly by 1961 when Mapp was decided. They were never effectively employed then, which may be why the exclusionary rule was invoked. It is difficult to understand why such alternative statutory remedies would suddenly become effective if Congress overturned the exclusionary rule today.

Sincerely,


HERBERT J. STERN

United States District Judge

National Association of Criminal Defense Lawyers



May 24, 1982

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Mr. Steven J. Metalitz
Staff Counsel
Senate Judiciary Subcommittee on
Criminal Law
162 Russell Office Bldg.
Washington, D. C. 20510

Dear Mr. Metalitz:

Enclosed please find a copy of our response to Senator Mathias' followup questions on the Exclusionary Rule. I am also enclosing a copy of our cover letter so that you might trace the whereabouts of the originals if you are so inclined. I hope to have responses to the two lately filed bills (S.2304 and S.2231) within the week.

If I may be of further service to you, please contact me at your convenience.

Thanking you very much I remain,

Very truly yours,

Louis F. Linden
Executive Director

LFL:dc

Enclosures

Louis F. Linden, Executive Director

National Office: 9600 South Loop West, Suite 380 • Houston, Texas 77054 • (713) 666-9777

*file Leg Comm
encl rule file*

April 19, 1982

Hon. Charles McC. Mathias, Jr.
c/o Committee on the Judiciary,
Subcommittee on Criminal Law
2226 Dirksen Senate Office Building
Washington, D. C. 20540

Dear Senator Mathias:

In response to yours of March 31, 1982, enclosed please find answers to your inquiries. Mr. Gerard Tressor who delivered our original testimony before your Subcommittee asked that I prepare the response on behalf of NACDL.

If you or your staff have any questions regarding this response or any other aspect of the Exclusionary Rule, please contact me at your convenience.

Thanking you for this opportunity to express the Association's position on the present Exclusionary Rule debate, for myself and on behalf of our members, I remain,

Very truly yours,

Louis F. Linden
Executive Director

LFL:dc

Enclosure

SCOPE OF CONGRESSIONAL AUTHORITY

The first argument presented is misleading in its simplicity. The Fourth Amendment Exclusionary Rule manifests itself in at least two different contexts, not just the evidentiary setting. The Exclusionary Rule is also a rule of procedure. Both of these sets of rules have a common characteristic, the sources of the rules. There exist three sources for both sets of rules: the Constitution, the common law, and legislation. Some rules are entirely of one source, while others are the result of the interplay between more than one source. An example of the latter is the relationship between the Sixth Amendment right to confrontation and the hearsay rule.

The hearsay rule has been developed in anglo-american jurisprudence for nearly four hundred years and has been adopted as a matter of policy based on common sense. Virtually independent of this historical basis, the Sixth Amendment rights to confrontation bolsters the rule and places limitations on the exceptions to the rule. Were the rule simply a product of the common law, Congress could certainly reform it in whatever way it wished. However, because the hearsay rule is founded in both the common law and the Sixth Amendment, and in light of the well accepted fact that Congress can pass no law violating the Constitution, the Sixth Amendment defines the parameters of any legislation dealing with the hearsay rule.

It is a basic tenet of our federal structure that the construction of the Constitution is the task and duty of the federal courts and, ultimately, the Supreme Court. It is further a basic rule that the Court's interpretation of the organic document may be overridden only by amendment of the Constitution itself. The question of Congressional authority to eliminate or limit the Fourth Amendment Exclusionary Rule is a question of separation of powers between the legislative and judicial branches. As Chief Justice Marshall wrote in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803),

"It is emphatically the province and duty of the Judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."

It cannot be disputed that the Congress may override an interpretation of its legislation by subsequent legislation. However, to allow such a modification of a constitutional interpretation would, in the words of the first Chief Justice, "... subvert the very foundation of all written constitutions."

The Fourth Amendment Exclusionary Rule is an interpretation of the Fourth Amendment and, as such, cannot be separated from the bare text of the Amendment itself. The fact that it is not specifically set out does not diminish its importance or impact. The Exclusionary Rule is therefore protected from congressional abrogation. To find otherwise is to make the Constitution a dead and useless thing incapable of effectuating its purpose, like a wagon deprived of its horses. The fallacy of the first argument presented lies in ignoring the difference between rules based on judicial experience and policy, and those which are interpretations of the Constitution.

To eliminate or otherwise legislatively modify the Fourth Amendment Exclusionary Rule would create the anomalous situation of having two different Constitutions, one applying to the federal government and one to the states. In addition to the separation of powers problem, the applicability of the Rule to the states adds dimensions of comity and federalism to the confusion. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961) was unequivocal on the nature of the restriction on the state.

"We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (emphasis added) 367 U.S. at 655

The Court held that the Exclusionary Rule was an essential part of the Fourth and the Fourteenth Amendment and was thereby binding on the states. The legislation presently pending before Congress speaks only to the exercise of the rule in the federal courts. Assuming arguendo that such legislation might be valid, the states are still bound by the dictates of Mapp and the cases following it. Should the Congress adopt legislation to relieve the states of the requirements of the Fourth

Amendment, it would be acting as a super-legislature for the states be defining the acceptable limits of their rules of evidence and procedure, thereby usurping the role of the Constitution.

The good faith exception does not provide the easy way out. While good faith may be very appealing in its own right, it ignores the basic language of the Fourth Amendment which prohibits unreasonable searches and seizures. The essence of this constitutional standard is that of objectivity. Every search and/or seizure must be judged according to whether it is reasonable. The good faith exception would make reasonableness irrelevant, as a search could be found to be simultaneously unreasonable and in good faith.

The enactment of a good faith exception by its logic should also require a good faith exception for criminal defendants. If law enforcement agents are allowed to contravene the law in good faith, can it be said that the country's citizens deserve less? The basis of the continual rejection of this defense to criminal culpability remains valid for those sworn to enforce the law. To enact a good faith exception solely for law enforcement officers would once again create two sets of laws, one for those who exercise official power and one for everyone else. Such a rule could not stand constitutional muster, especially if considered in light of criminal civil rights statutes. Would good faith also apply to criminal charges against an officer for violation of the civil rights of a criminal defendant? A negative answer results in a contradiction. For example, an officer could believe in good faith that he had the right to pump a suspect's stomach and if the court so found, the resulting evidence would be admissible. If the same officer was subsequently charged with a criminal civil rights violation arising from the same conduct, he would not be protected by the good faith exception and could be convicted. The court would then have admitted evidence obtained by a criminal act. If the good faith exception applied in both contexts, there would seem to be a denial of equal protection. A police defendant could plead good faith to participation in a criminal civil rights violation while the civilian would not have the benefit.

In addition to the internal contradictions, there also remains the federalism problem mentioned supra. Once again, there would be one constitution for the states and one for the federal government.

Confusion Between the Exclusionary Rule and Content of Substantive Fourth Amendment Law

A searching analysis of the Supreme Court's Fourth Amendment decision and a statistical analysis of the actual effects of the sanction's imposition or nonimposition would give the Subcommittee a truer picture of the state of affairs in this area. The bills presently pending before the Subcommittee are based upon rather dubious assumptions. In fact, the Subcommittee will find that the Supreme Court and the inferior federal courts do not set hoardes of criminals loose to prey upon society. The statistics cited in the Association's previous testimony (see Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Gen. Acct. Off. GCD-79-45, 1979) are witness to the facts, and the Courts' decisions would provide great insight as to the process by which this result was obtained. In short, it would invoke the old maxim, "If it ain't broke, don't fix it!"

Good Faith and Premium on Ignorance

American jurisprudential history is rife with instances of abuse of power that was virtually unchecked until the advent of the Exclusionary Rule. The Rule provided a rational motive for obeying the law and a correlative sanction for those who did not. It ignores human experience to expect the same results after the sanctions are removed.

How does a court decide the definition of informed? Does it mean that the officer read about the law or knew what the law was? Is it enough to read it and later "forget" it? Given that from the officer's point of view, a successful conclusion to the case might hang in the balance, is it realistic to expect him to admit to knowing and understanding the law and violating it inspite of his knowledge? It is more likely that he will say that he "forgot" or "misunderstood" and that he really didn't want to break the law. As mentioned earlier, we have denied this form of

defense to those accused of crimes and for very good policy reasons. Those reasons are no less valid for law enforcers than for the rest of the citizenry. We cannot realistically expect more from law enforcement personnel than we expect from ourselves.

Professor Kaplan's Criticism of Good Faith

The perception of virtually every man and woman who tries criminal cases in the courts of this land as a defense advocate is well set out by Professor Kaplan. Judges are widely perceived as being hostile to the Exclusionary Rule. Many, perhaps a majority, of judges are perceived as being drawn from the ranks of the prosecution and being unduly sympathetic to the prosecution. Statistics which show that all but a very few motions to suppress on Fourth Amendment grounds are denied would seem to support this contention. Given the subjective (and inevitably self-serving) nature of the officer's testimony regarding his own state of mind, the result is foreordained.

Objections to the Exclusionary Rule

(1) Insofar as the Rule deters unreasonable searches and seizures, it benefits all who live within our borders. As a nation and as individuals, we all have a stake in the integrity of the criminal justice system. Innocent victims of searches have a remedy under Bivens v. Six Unknown Named Agents, 403 U.S. 388, 81 S.Ct. 1999, 29 L.Ed 2d 619 (1971) which holds that federal courts are empowered to award money damages for violations of civil rights by a federal officer. However, if Congress is truly interested in vindicating the rights of the innocent subjects of unreasonable searches or seizures, there is certainly no bar to enacting a more formidable remedy in addition to the Fourth Amendment Exclusionary Rule.

(2) Currently, law officers and judges alike are stating once again the desirability of predictability and consistency in Fourth Amendment law. In its present state, the law is criticized by law enforcement for being convoluted and reaching contradictory results. To include the gravity of the offense and/or the "degree of official mis-

conduct" would hopelessly confuse and unnecessarily complicate the calculus. Officers are now heard to complain that the law is too complex and voluminous to be understood or, for that matter, remembered. The addition of these two considerations would simply add to more variables.

The heart of the judicial system is the making of decisions. In making decisions, the decision maker must decide what factors will be included as being relevant. Neither the gravity of the offense or the "degree of official misconduct" have relevance to the reasonableness of the search or seizure in question. It is therefore quite rational, indeed it is required, that these irrelevant factors not be considered.

Effect of the Exclusionary Rule

The statistical history of the Exclusionary Rule demonstrates that the number of suppression motions granted declines with experience. This would seem to indicate that once the Rule is applied, it motivates law enforcement agents to learn and observe the law. Observance of the law encourages the use of more reliable permissible methods of investigation and results in tighter better developed cases. The new Canadian Constitution includes an exclusionary rule similar to that of the Fourth Amendment. It was adopted specifically in reaction to the effects of the rule in Wray' Case. The rule in that case allowed the introduction of evidence regardless of the circumstances under which it was obtained. Gross and frequent abuse of citizens' rights was the result of that rule and the Canadians have clearly observed that the removal of such restrictions has a deleterious effect. Even the much-vaunted Royal Canadian Mounted Police were found to have perpetrated intentional violations of the rights of citizens in order to obtain evidence. The lesson to be learned is that there must always be checks and balances to the official exercise of power by the government.

Tort Remedy for Fourth Amendment Abuses

The argument stated here is a reflection of reality. Indeed it has been the experience that even where the Plaintiff is not accused of a crime,

he or she comes into court with credibility inferior to that of a policeman. This is a natural phenomenon. We grant to our police the sole right to the legitimate use of force in our society. A natural corollary of this grant is that we must at least to some extent trust the persons imbued with this monopoly to exercise it in our interest. When the interest of the policeman and the citizenry diverge, the power very often becomes a weapon of oppression. We make our law enforcement officers subject to the same laws as ourselves and then we trust and pray that they will discharge their duties accordingly. As children, we are taught that the policeman is our friend and a doer of right and good. We then internalize this image which becomes the foundation for the legitimacy of the police. If we did not at least to some extent believe in the moral quality of these officers, then government would lose its legitimacy. Lacking legitimacy, only brute force would enable the police to regulate our affairs. Hence, we all have a stake in our police being law-abiding public servants.

Fairness of Damage Remedy for Fourth Amendment Violations

1. The rich and the poor are likewise forbidden to sleep under bridges, that is the reality of the civil tort remedy. The minimal likelihood of obtaining damages discussed earlier discourages attorneys from taking such cases on a contingent fee basis and, given that the vast majority of criminal defendants are indigent, means that access to this remedy is very limited. Police have relatively little reason or opportunity to violate the rights of the rich and often violate the rights of the poor. This is merely a reflection of the demographics of the criminal justice system. Further, the plaintiff is stigmatized by his involvement in the criminal justice system as a defendant, a stigma which is more easily ignored by judges than juries. Another aspect of money damages which poses problems in this contest is valuation. Juries would put a higher value on the rights of a bank president than a twice convicted heroin dealer, yet there would be no distinction in the law regarding the violation of their rights.

2. The award of attorney's fees under S. 751 will do little if anything to ameliorate the disparity of opportunity for vindication of Fourth Amendment rights. Insofar as they are discretionary, the attorney's fees

will be subject to the same kind of valuation problem mentioned above. The benefit to the plaintiff is a factor usually taken into account in the discretionary award of attorney's fees. Another negative aspect of this scheme is that in addition to being contingent upon winning, the award of fees lies in the distant future. Given the crowded nature of the district courts' civil dockets, the cases may not be tried for at least a year after filing. As a result, any return to the attorney is far removed in time from the decision to undertake the case. Money in the future is normally discounted from its present value in commercial contexts and should be viewed in the same way in regard to attorney's fees. Yet this factor is almost never taken into account in the decision to award fees after the fact of the litigation.

A major portion of the bar avoids participation in the criminal justice system... One reason for this is often a disinclination to associate with criminal defendants. Compensation which will probably be inadequate and long in coming is not likely to overcome that disinclination. Lawyers will further take a cue from the Criminal Justice Act as a measure of the range of compensation which they might expect. After the ravages of inflation, they provide precious little encouragement to the active lawyer to turn away from other civil cases to engage in this kind of litigation. It has been found time and time again that there is a direct relationship between the quality of counsel and the likelihood of meaningful compensation.

FEDERAL DEFENDERS OF SAN DIEGO, INC.

24 May 1982

Honorable Charles McC. Mathias, Jr.
United States Senator
348 Russell Senate Office Building
Washington, D.C. 20510

RE: S. 101, S. 751, and S. 1995
Abolition or Modification of
Exclusionary Rule

Dear Senator Mathias:

In response to your questionnaire on the proposed legislative changes to the Exclusionary Rule, I would offer these comments, some of which have already been covered in my testimony on 16 March 1982.

1. EXCLUSIONARY RULE IS A JUDGE-MADE RULE OF EVIDENCE THAT CONGRESS MAY NEGATE.

RESPONSE:

All pronouncements by judges are rules of law. The source of authority, although characterized by some as the exercise of the court's supervisory power, was at all times founded upon the unequivocal constitutional language of the Fourth Amendment. In Weeks v. United States, the opinion indicated that not to have the Exclusionary Rule was the equivalent of striking the Fourth Amendment from the Constitution. Justice Holmes in 1920 in the Silverthorne case stated that the use of such illegally acquired evidence would reduce the Constitution to a form of words.^{1/} Miranda v. Arizona was an application of the Fifth Amendment and although Congress unwisely enacted 18 U.S.C. § 3501 (admissibility of confessions), the Supreme Court of the United States has not formally approved that congressional mandate. A statute in conflict with the Constitution would not prevail. The constitutionality of the Fourth Amendment requirement of the Exclusionary Rule was brought home in that the Fourth Amendment through the conduit of the Fourteenth Amendment Due Process Clause was made applicable to the states in Mapp v. Ohio (1961). This landmark

^{1/} For the complete citation, see my statement filed on 16 March 1982.

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opinion written by a former Attorney General of the United States, known as a conservative law enforcement justice who in his past had approved of the detention camps for Japanese-Americans during World War II, should be sufficient guidance to Congress that the rule was not one formulated for federal courts as to the etiquette of evidence. Justice Clark after reviewing police behavior acknowledged the rule's constitutional underpinnings.

The Exclusionary Rule emanating from the Fourth Amendment should not be treated as an ordinary rule of evidence which regulates admissibility of evidence generally. For example, the Best Evidence Rule requires the original be produced or its absence explained before secondary evidence is admissible. It has a different foundational nature than the McNabb-Mallory Rule that dealt with federal criminal practice. Throughout the hearings on this legislation there is much confusion concerning the courts in which such legislation would be made applicable. The supervisory power of the federal court is limited to federal courts. The Exclusionary Rule is not one of supervisory power but rather one of constitutional magnitude.

2. DOES CONGRESS HAVE THE CONSTITUTIONAL POWER TO ADOPT A GOOD FAITH EXCEPTION TO THE RULE?

RESPONSE:

The adoption of the "good faith exception" would reduce the Fourth Amendment to the partisan opinion of the police officer. Such congressional evisceration of the rule would not be constitutional, for it would place the enforcement role in the subjective opinion of the police officer (executive) when in fact the Fourth Amendment was established to provide objective (judicial) restraint of the police. The principle of "checks and balances" requires that a different branch of government conduct the review, but the good faith exception would make the police the reviewers of their own conduct which goes against the fundamental diffusion of power sought by the founding fathers.

- A. The principal basis for the rule is not solely deterrence, but includes governmental respect for the fundamental right of privacy, the integrity of the judiciary, the rule of law (that government agents are subject to the law), and public respect for government (the action of police officers believing that they are above the government brings general government into disrespect).^{2/}

^{2/} These additional purposes are outlined in my 16 March 1982 statement in greater detail (pp. 5-7).

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- B. "Good faith" is an amorphous concept too easily accepted by a judge sitting without a jury to excuse any Fourth Amendment violation. Now any controversy at a suppression hearing concerning facts is always resolved in favor of the officers (the police officer is believed against contrary testimony from the defendant or witnesses). See Matlock v. United States, 415 U.S. 164 (1974), where the girlfriend of the defendant stated she did not consent to the search of her house by the FBI, but the trial judge found the FBI agents were truthful.

The good faith defense is now available in a civil rights lawsuit against the police officer, but a jury after full exploration through litigation determines that even though a violation occurred the circumstances were such that a reasonable, prudent police officer would be excused for his conduct. In a criminal proceeding, the motion to suppress hearing is extremely summary before a judge only and there is lacking the objective scrutiny that would be necessary to make a conscious effort to determine if there was in fact "good faith" of the officer. If the conduct was objectively in good faith (an existing ordinance although unconstitutional, permitted the arrest by the officer, Michigan v. DeFillippo) then the conduct of the officer would be permitted and the evidence admitted in a criminal proceeding. Once the good faith degenerates into the statement of the police officer, suppression would be granted only where the police officer said that his conduct was in "bad faith." To expect police officers would characterize their conduct as other than in "good faith" is both naive and unrealistic. If Congress were to adopt the good faith exception, then it would have to set forth a rigorous procedure to evaluate the good faith of the officer and, as in the civil case, the defendant should be permitted a jury trial on that issue. Many might not appreciate a double jury trial, but there is little else to provide the need for extrinsic scrutiny.

- C. The syllogism founded on the invalid premise of deterrence only is invalid. Secondly, actions taken in "good faith" in violation of the Fourth Amendment might be deterred if there was a greater penalty with the certainty of enforcement. All the alternatives to the Exclusionary Rule are rarely applied, and in criminal proceedings motions to suppress are rarely granted (1.3% of the time). Therefore, the officers can feel that the rare enforcement does not justify their compliance with the Fourth Amendment. The "good faith" exception proposed by some sanctifies the prevalent lack of redress for common

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violations of the Fourth Amendment and would suggest that Congress could wink its approval of these violations by adopting a talisman of "good faith" that would justify any police misconduct so long as the officer could say it was in good faith.

3. CONFUSION BETWEEN EXCLUSIONARY RULE AND THE FOURTH AMENDMENT.

RESPONSE:

Any government investigation must confront the individual's fundamental right of privacy. In our "classless" society, we differentiate as to "accused persons" who are allegedly presumed to be innocent. Once the finger of accusation is pointed, the accused loses first class citizenship and becomes second in worth to police agents of the states. Citizens believe they have a fundamental right of privacy. All expect to be insulated from uncontrolled police inquiry and governmental intrusion into their private lives, but some citizens have a hard time understanding that such a constitutional proposition applies to all in our society even those suspected of crimes. If the rule does not work for the least of us it does not work for any of us. No worse hypocrisy can be imagined than to acknowledge a rule that has no application.

4. GOOD FAITH AND PREMIUM ON IGNORANCE.

RESPONSE:

A professional police agency is expected to be knowledgeable and informed on the requirements of the law. The law of search and seizure in its application to unique factual situations is different because of the differing facts, but the unalterable principle that emerges is that the citizen, even a suspect of crime, is entitled to respect from the agents of the government. The right of those citizens to be "secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated," and police officers must tread lightly and only with judicial review absent exigent circumstances conduct searches of places or seizures of persons. The statement by the Department of Justice is patently unbelievable, for the good faith exception encourages the officer to rely upon his "gut reaction" or "common sense" so that his actions can be later justified in court. Knowledge becomes a burden, for learning the law an officer will reduce his effectiveness. If the informed officer knows of the Fourth Amendment and that a warrant is necessary to search a house absent consent or exigent circumstances, he

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may enter without the warrant and later claim because of ignorance that the warrantless entry was justified. If he is aware of recent case law, the entry will not be in "good faith." If on the other hand, the knowledgeable officer contacts an uninformed or ignorant officer who is not familiar with that Supreme Court precedent and asks him to conduct the search, then the search would be conducted in "good faith" because the ignorant officer was unaware of the Supreme Court precedent. The supervisor of the informed officer and the ignorant officer would readily be able to judge who was the "better" officer--certainly not the informed officer who was "hung up" on these legal peccadillos. In addition to the question of lack of information, there would be a strong compulsion to reward deception, for if an officer knew it was against the law but he testified that he was uninformed of the law, then his action could be considered in good faith. Defense counsel would be in the luckless position of examining the officer on how well informed he was as to the law as to seek redress by showing how informed the officer was, whereas the officer could blame his ignorance as the best defense to any inquiry into his conduct.

5. ALLEGED IRRATIONALITY OF THE RULE.

RESPONSE:

The Exclusionary Rule to preserve the fundamental right of privacy in a criminal case operates to exclude the evidence to demonstrate to the public as well as the police that ours is a government of laws. Inherent in our system of justice is the principle of morality that a lawful means be used to obtain a lawful end. We have condemned the use of any means to achieve a good end. The rule is applied in a common sense fashion, does not hold police officers to technical basis, but has a widely established list of exemptions, i.e., consent, exigent circumstances, emergency, hot pursuit, incident to arrest, immigration checkpoint, customs, etc. The emergency doctrine or the principle of exigent circumstances justifies the absence of either probable cause or a search warrant. So also the consent of a defendant eliminates any further scrutiny as to the basis for the search or whether a warrant was required. The rule has been modeled over the years in a common sense fashion.

- A. The criminal case is a vehicle that will obtain judicial scrutiny not only at the trial level but the appellate level. A person seeking civil redress for an unlawful search is seldom able to litigate the issue, and even if able, is seldom able to pursue it in the appellate courts because of the overwhelming costs of such litigation.

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Criminal cases, and approximately 70% of the felony defendants are indigent, provide a vehicle for judicial scrutiny and public awareness for activities that would otherwise not be publicized.

- B. Only official misconduct that violates the privacy of a particular person is the basis of a motion to suppress. Police misconduct that is not directed towards an accused is exonerated, for the rule does not apply where the defendant does not have "standing." The court always accepts the officers explanation as to the basis for the search, i.e., contraband was in plain view, the defendant gave consent, the informant's information was reliable, or there were exigent circumstances justifying a search without a warrant. The official misconduct must be found from the very statements of the officers in court, which is most difficult to establish with the re-creation of the event through hindsight testimony. The officers are partisans in the proceedings and will testify so as to provide legitimacy for the search. When it is understood that official misconduct is literally found "out of the mouths of the police officers" then it will be realized how difficult it is to establish--an insurmountable hurdle. Ours is a nation that operates under the rule of law. The same law applies to all cases. The Fourth Amendment does not exempt murder cases or serious dope cases. Even then, the crimes of violence cited for diluting the Fourth Amendment are not common in federal courts. Federal legislation designed for federal cases should focus on the more reoccurring federal crimes, i.e. immigration offenses. Although serious dope cases are the concern of both federal and state courts, murder, robbery, and rape are much more rare than in state courts.
6. FOR THOSE WHO PRACTICE IN FEDERAL COURTS, IT IS HEALTHY TO SEE A FEDERAL OFFICER ACCOUNT TO A JUDGE IN A SUPPRESSION HEARING AS TO PROCEDURES HE FOLLOWED IN THE ARREST OF A PERSON OR IN THE SEARCH OF HIS HOUSE.

RESPONSE:

As demonstrated by the one empirical survey conducted (the 1979 GAO Study) the overwhelming motions to suppress evidence filed by defense lawyers were denied. More than 90% of the federal criminal convictions are disposed of by plea of guilty

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which in itself is a waiver of any search issue.^{3/} The unfortunate experience of the Federal Bureau of Investigation of internally authorizing "black bag" jobs demonstrates a complete lack of understanding its police authority and the Fourth Amendment. The criminal cases that articulated the continuing concern for the enforcement of the rights of privacy protected by the Fourth Amendment have lead to the realization that there are limits on police conduct. It was unfortunate that two FBI officers in 1980 were convicted of violating citizens' civil rights by authorizing unlawful searches, but that jury verdict in a criminal case was a lone beacon that federal law enforcement officers were subject to the Constitution. Good officers wish to conduct themselves in the conduct of searches so as to reflect the highest degree of professionalism when called upon to account in a court of law. Their work regularly brings them to federal court, and their contacts with other officers reveals that the courts are concerned with compliance with the Fourth Amendment. These standards of enforcement that require officers to respect the personal integrity of each individual, even suspects whom they may not care for, enhances the whole system, for all are treated with fairness. Everyone is protected by the law, and nothing says it better than the Fourth Amendment.

Most officers do have an interest in seeing the successful prosecution of a case they initiated. That desire for conviction requires them to understand the law and recognize the limits of their authority. Most strive to live within those limits, and the suppression hearings are an educational process to continuously sensitize them to their obligations not only enforce the law but to abide by it themselves. Unfortunately, some officers, caught up with the philosophy that the end does justify the means, feel that they can say ritualistic or formalistic words that will justify the search. It is this unfortunately reoccurring hindsight reconstruction that embarrasses our system.

^{3/} There is a proposed amendment to the Fed.R.Crim.P. 11 that would permit a conditional plea so as to raise any constitutional issue, including search and seizure questions, after a plea of guilty. This practice exists in some circuits but is condemned in others. The number is probably too small to make any noticeable impact, for most entries of a plea are pursuant to discussions that have eliminated the search question for further review.

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To provide a good faith exception is to do little more than aggravate the potential for perjury. Under the present system there is a minimum accountability in the courtroom. The state, the United States, acting through its minions, must be held accountable for its officers, otherwise the state and its agents become immune and are raised to a status above the law. Our democratic society should emphasize rather than eliminate police adherence to the law.

7. TORT REMEDY FOR FOURTH AMENDMENT ABUSES.

RESPONSE:

The few civil rights actions against officers do not reflect few violations. The overwhelming cost of litigation and the limited opportunity of recovering even compensatory damages inhibit such suits. Jurors take into consideration the criminal case and are often sympathetic to police officers. If there is a dispute in testimony, most often the jurors or judge alone will accept the police officer's explanation. Ironically, the greatest cost to the Federal Government for such suits arises out of government payments for defense counsel for the individual federal officer who is civilly sued for an unlawful search. Since the government may be sued for the conduct of the federal officer (Federal Tort Claims Act), the Department of Justice can not serve as counsel for the United States and the individual officer. Because of this professional conflict, then retained counsel (some drawing as much as \$100,000 in a single case) are provided for these individual federal officers. Over and above the damages that might be obtained by the plaintiff, the government has suffered a substantial loss in providing an attorney for the defendant federal officer. At the present time there is a move afoot to give these officers immunity which would be a greater public evil than the damages suffered or compensation paid their private attorneys. A system of accountability may be costly, but necessary. Immunized police officers are but a short step from tyranny of a police state. Police accountable only to the police have no greater authority than themselves.

If the government now provides paid counsel for the individual defendant officers, then the Federal Government should also provide for compensated counsel to represent the plaintiff to obtain a fair presentation under our adversary system. Counsel for such plaintiffs might not earn the fees provided to separate counsel for defendant federal officers, but they could be paid at least at the pernicious rates provided under the Criminal Justice Act (\$20 to \$30 per hour, 18 U.S.C. § 3006A).

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8. FAIRNESS OF DAMAGE REMEDY FOR FOURTH AMENDMENT VIOLATION.

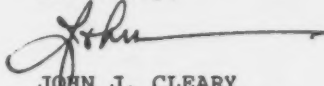
RESPONSE:

- A. In a criminal proceeding where jail is possible, the defendant has the right to counsel to assert a suppression issue. The defendant or an innocent person has no right to counsel to pursue a civil suit for money damages for a violation of the Fourth Amendment. Although the law now permits recovery of attorneys fees if counsel is the prevailing party, the law should be changed to provide for the appointment of counsel by the district court. If a plaintiff demonstrated probable cause that his Fourth Amendment rights had been violated, then the court should be able to appoint and have compensated an attorney to pursue redress. If the suit prevails, then that compensation provided by the government would be a possible item of damages that could be assessed against the offending officer or the governmental unit. Personal liability of the individual police officer can not be underestimated, but at the present time civil suits are only an illusory remedy. Any experienced police officer knows that there are few lawyers that would take such cases. These officers, not legally immune, are practically immune from such suits. If such suits became a viable alternative, they might have a potential for deterrence. An experienced Chicago police officer once said, "Better that murderers walk the streets free than I have a lien on my house." Although an exaggeration, the statement reveals a sensitivity to pecuniary liability beyond the impact of the suppression of evidence.
- B. S. 751 provides more immunity for the officers than it does a remedy for the claimants. By limiting the claimant to an action against the government it denies the plaintiff the fundamental right to trial by jury as well as the possibility of punitive damages. Attorneys fees should be awarded to a plaintiff, successful or otherwise. If the claimant is successful, it would seem even under existing law that they should be granted whether or not the claimant is indigent. As indicated above, there should be a provision for the appointment of counsel whether it is against the individual officer or the government, that counsel should be compensated with the thought that such fees could be awarded as damages and would not otherwise be an expense to the government. It is only fair that some miniscule effort to provide counsel to injured plaintiffs balance the existing government policy to provide separate counsel at prevailing rates, i.e., \$100 an hour to alleged offending federal officers.

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Although you were not present on 16 March 1982, I appreciate the opportunity to appear before your Committee on this controversial topic. The debate has generated more heat than light. For those who practice in the federal courts regularly, this legislation appears as political rhetoric to appease an uninformed public. Motions to suppress evidence are rarely granted in federal court, and practicing lawyers know this. This legislation is little more than statutory license for the federal police to disregard the Fourth Amendment.

Sincerely,



JOHN J. CLEARY
Executive Director

JJC:VJ:teh

cc: Federal Defender Legislative Committee

Theodore J. Sakowitz, Chair
Federal Defender Advisory Committee

Norman B. Lynch, Chief, CJA Division
Administrative Office of the U.S. Courts



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 04 1982

Honorable Charles McC. Mathias, Jr.
Chairman
Senate Judiciary Subcommittee
on Criminal Law
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter of April 14, 1982 to Assistant Attorney General D. Lowell Jensen requesting the views of the Department of Justice on S. 2231 and S. 2304, bills dealing with the exclusionary rule. As you know, S. 2231 was drafted by the Department of Justice and was introduced at the request of the Administration by letters to the Vice President and Speaker dated March 10, 1982. S. 2304 differs slightly from S. 2231 as discussed in our letter of May 26, 1982 to the full Committee.

I believe that these two letters, together with the testimony of Assistant Attorney General Jensen before your Subcommittee on October 5, 1981, fully set forth the Department's position on the exclusionary rule and our reasons for strongly supporting S. 2231. In order to avoid further delay in responding to the Subcommittee, I am enclosing copies of these previous letters rather than restating our views.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Enclosures



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 10, 1982

The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for your consideration and appropriate reference is a legislative proposal to amend title 18 of the United States Code by adding a new section, 3505, to Chapter 223 to limit the application of the Fourth Amendment exclusionary rule in federal court proceedings. The proposed bill would eliminate the application of the exclusionary rule in situations where the rule's deterrent purpose is not served because evidence was obtained pursuant to a search or seizure undertaken by law enforcement officers in the reasonable and good faith belief that their actions were lawful.

The proposal is intended primarily to enhance the operation of the federal criminal justice system by allowing courts greater access to all reliable evidence relevant in determining the guilt or innocence of the defendant, and to promote renewed respect for that system as a search for the truth in the minds of our citizens.

The exclusionary rule is a judicially created rule under which evidence is barred from introduction at a proceeding such as a criminal trial if the evidence is determined to have been obtained as a result of a search or seizure that violated the first clause of the Fourth Amendment, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The rule is of comparatively recent vintage and was not even applied by the Supreme Court in the context of the Fourth Amendment until 1914, 123 years after the Fourth Amendment was adopted; it has only been held applicable to state criminal proceedings for the past twenty years.

There are no constitutional or statutory provisions which specifically set limits on what is meant by an "unreasonable" search or seizure. Instead the law in this area is an amalgam of cases dealing with a vast range of issues relating to the undertaking of searches and seizures. Yet courts continue to apply the rule even as they continue to develop the law of search and seizure. The heart of the present problem in application of the rule is that it has been expanded gradually by the courts to apply in situations in which the rule cannot possibly serve its primary purpose of deterring police misconduct. This distortion of the rule's purpose has resulted in a substantial cost to our society as law enforcement officers and private citizens alike have lost faith in our criminal justice system.

In considering those costs the Supreme Court has stated that the rule "deflects the truthfinding process and often frees the guilty," *Stone v. Powell*, 428 U.S. 465, 490 (1976); its "cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truthfinding functions of the judge and jury." *United States v. Payner*, 447 U.S. 727, 734 (1980). The Court's recognition of the price exacted by the rule now causes it to answer the question of whether the rule should be applied in a particular context "by weighing the utility of the

exclusionary rule against the costs of extending it..." Stone v. Powell, *supra* at 489.

When first imposed by the Supreme Court in 1914, the exclusionary rule was justified both as a means of deterring unlawful police misconduct and on a judicial integrity ground, which sought to prevent courts from being accomplices in willful constitutional violations. Over time, it has become clear that the deterrence rationale is the foremost reason behind the rule. Cases such as Stone v. Powell, *supra*, Michigan v. DeFillippo, 443 U.S. 31 (1979), United States v. Peltier, 422 U.S. 531 (1975), and United States v. Calandra, 414 U.S. 338 (1974), have clearly established that today the rule will be invoked to protect Fourth Amendment rights only when to do so is deemed efficacious as a deterrent to unlawful conduct by law enforcement authorities. In consistently focusing on the deterrence rationale in defining and limiting the application of the rule, the Court has all but ignored the judicial integrity ground. At any rate, to the extent that notions of "judicial integrity" are still a basis for the rule's retention, the Supreme Court in Peltier, *supra*, has stated that "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law..." 422 U.S. 531, 537-38.

Although the Court recognizes deterrence as the rule's paramount purpose, it has not limited the rule only to those situations in which the law enforcement officer's conduct is susceptible to being deterred. For example, courts continue to suppress evidence seized by law enforcement officers during searches conducted pursuant to duly authorized warrants obtained in good faith but later found defective by an appellate court. Such was the situation in Spinelli v. United States, 393 U.S. 410 (1969). The exclusionary rule was also applied in a recent case where DEA agents, following a rule of law adopted in their circuit and two other circuits, seized evidence only to have it suppressed years later by the Supreme Court, which rejected that particular rule. See Stegald v. United States, 451 U.S. 204 (1981). Cases such as those involve disagreements by federal judges, not police misconduct. Yet the evidence is suppressed despite the fact that the officers are conducting themselves properly by carrying out the orders of the court.

A more frequent problem with application of the rule arises when police in the field are confronted with a question as to whether they can make a warrantless search or arrest. Although arrests and seizures may sometimes be made without a warrant, the specific rules governing police conduct are to be found in hundreds of appellate court decisions that are often confusing or even flatly contradictory. The police must make an immediate legal analysis, often while confronting a known criminal. These situations often present such difficult factual situations coupled with a high degree of danger to the officer that the rule can in no way act as a deterrent.

The rule was applied in precisely this type of case by the Supreme Court last term in Robbins v. California, 101 S. Ct. 2841 (1981). In Robbins, the Court excluded evidence of a substantial quantity of marijuana found in a car trunk in a decision based largely on two previous cases, United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in Robbins in 1975. The Robbins decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; seven found it valid; seven invalid. To add to the confusion, less than three months after it decided Robbins, the Supreme Court granted certiorari in United States v. Ross, 102 S. Ct. 386 (1981) and asked both sides to address the question of whether Robbins should be reconsidered. It is unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating, especially when the examination to test his knowledge is suddenly presented in a potential life or death situation.

It is the type of situation exemplified by Spinelli, Steagald and Robbins, where the conduct of the officers could not be deterred, that would be covered by our proposal. The often highly probative evidence found during a search undertaken by the officers in reasonable good faith would be admitted and the attention of the court in a criminal case would remain focused on the question of the defendant's guilt or innocence, not diverted to a consideration of possible police error in applying the ever evolving law of search and seizure. Our proposal would still allow consideration of police conduct but the issue would be whether the actions of the law enforcement officers were undertaken in a reasonable and good faith belief that they were lawful. Such good faith is clearly shown when an officer makes an arrest in reliance on a statute that is later found to be unconstitutional or relies on a duly authorized search warrant, a judicial mandate to search which he has a sworn duty to carry out. Hence, the proposed bill specifically provides that a showing that evidence was obtained pursuant to and in the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief.

It is important to note that a search pursuant to a warrant would not constitute such evidence if the warrant were obtained through intentional and material misrepresentation. This standard is derived from Franks v. Delaware, 438 U.S. 154 (1978) where the Court emphasized the presumption of validity with respect to an affidavit offered in support of a warrant but held that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." 438 U.S. at 155-156. If at the hearing the defendant establishes that perjury or reckless disregard for the truth was present, and with the affidavit's false material set aside the remaining material is insufficient to establish probable cause for the warrant's issuance, it must be voided and the fruits of the search excluded.

Our proposal is not, however, limited to searches executed pursuant to a warrant. An officer may in good faith make a reasonable interpretation of a statute which a court determines to be inconsistent with the legislative intent, or may reasonably and in good faith conclude that a particular set of facts and circumstances gives rise to probable cause to conduct one of the types of judicially sanctioned warrantless searches, or that a warrant is not required. The proposed legislation would cover such situations as well.

Although intended primarily to apply in criminal proceedings brought in federal court the proposal is drafted so that the same reasonable good faith test would apply to the obtaining of evidence offered in all types of proceedings in federal courts such as applications for federal habeas corpus petitions filed by state prisoners and federal civil cases. Indeed these are the types of cases where the deterrent effect of the rule has already been found to be minimal at best and greatly outweighed by the societal cost of excluding the evidence. In Stone v. Powell, *supra*, the Supreme Court held that where a state has provided a full and fair opportunity for litigation of Fourth Amendment claims, a state prisoner may not be granted federal habeas corpus relief on the grounds that evidence obtained by an unlawful search and seizure was introduced at trial. In United States v. Janis, 428 U.S. 433 (1976), the Court held that the exclusionary rule should not be applied to forbid the use in federal civil proceedings of evidence seized by state officers in good faith reliance on a search warrant that proved to be defective. While the Janis holding (the scope of which would not be affected under our proposal) related specifically to the use in the courts of one sovereign of evidence obtained by law enforcement agents of another sovereign, the lack of any deterrent effect of applying the rule would be analogous in the case of a search by federal officers who were acting in good faith.

Our proposal will still encourage and require law enforcement officers to keep abreast of the complex law of search and seizure

because the conduct of an officer will have to be informed to be reasonable. Our proposal does not reward ignorance on the part of the police. It simply restrains the rule to its proper boundaries where it will remain as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect..." United States v. Calandra, 414 U.S. 338, 348 (1974). Thus our proposal would not eliminate the exclusionary rule but rather will eliminate the disrespect for the law that its application often engenders in the minds of the police and the public alike. Moreover, when the rule is applied in the case of a trivial violation or mistake by the police as to whether the requirements of the law have been complied with, and results in the acquittal of a criminal guilty of a serious crime or alters the result in a significant civil proceeding, the lack of proportionality of the sanction applied to the officer's mistake is so great that the confidence of the public in our system of justice cannot help but be eroded. In cases of this nature, where the police have reasonably tried to apply the complex law of search and seizure, the rule has a grossly distorting effect on our system of justice where the central purpose is to search for the truth and, in criminal cases, ensure that the guilty are convicted and the innocent are acquitted.

The Department is satisfied that the Congress may, and indeed should, act to limit the exclusionary rule. In fact, the dissent of the Chief Justice in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422-424 (1971), invited Congressional action. Since our proposal is grounded primarily on the cases decided over the past ten years in which the Supreme Court has emphasized the deterrence of unlawful conduct as the sole or primary purpose of the rule, the Department has concluded that such a modification would be held to be constitutionally permissible. In addition, as mentioned above, our proposal is fully consistent with the principle of judicial integrity as well as with that of deterrence.

The proposal I am submitting is very similar to that already adopted by the Fifth Circuit en banc in United States v. Williams, 622 F. 2d 830 (1980), cert. denied, 449 U.S. 1127 (1981) in a decision based on a thorough analysis of relevant Supreme Court cases, and it basically follows the recommendation of the Attorney General's Task Force on Violent Crime which conducted hearings on the issue around the country and received the opinions of distinguished citizens and jurists of all points of view.

The Office of Management and Budget advises that submission of this proposal is in accord with the Administration's program.

Sincerely,



Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that (a) Chapter 223 of Title 18, United States Code is amended by adding at the end thereof the following new section: "§3505. Limitation of the Fourth Amendment exclusionary rule.

"Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation."

(b) The table of sections of such chapter is amended by adding at the end thereof the following item:

"3505. Limitation of the Fourth Amendment exclusionary rule."



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 26 1982

Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S.2304, a bill to limit the application of the exclusionary rule. The Department of Justice supports a legislative modification of the exclusionary rule but does not support this bill unless amended as suggested below.

As you are aware, S.2304 is similar to the Administration's proposal for limiting the application of the exclusionary rule which was introduced as S. 2231. Both bills provide that evidence seized in violation of the Fourth Amendment would not be excluded if the search was undertaken in a reasonable and good faith belief that it was in conformity with that Amendment. Both bills also provide that a showing that the evidence was obtained pursuant to and in the scope of a warrant would constitute prima facie evidence of such a reasonable good faith belief unless the warrant was obtained through intentional and material misrepresentation. The only difference between the two bills is that S. 2304 would provide an alternative basis for admitting illegally seized evidence namely if to exclude the evidence "would constitute a grave miscarriage of justice."

The Department of Justice is opposed to the inclusion of such a provision in legislation dealing with the exclusionary rule. Initially, the meaning of the phrase "grave miscarriage of justice" is imprecise. Even if found to pass constitutional muster, the phrase would invite time-consuming litigation over its meaning in virtually every case involving a search or seizure found to be in violation of the Fourth Amendment.

In addition to problems of vagueness, the "grave miscarriage of justice" standard is constitutionally suspect because it is not supported by the same constitutional rationale as is a "reasonable good faith" test. The latter is derived from Supreme Court cases, particularly in the last ten years, that have emphasized deterrence as the sole or primary purpose of the rule. For example, as the Supreme Court stated in Michigan v. Tucker, 417 U.S. 433, 447:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

The Administration's proposal is based on a recognition that the rule as currently applied in most courts goes beyond its stated rationale, since the sanctions of exclusion can have no deterrent effect on an officer acting in reasonable good faith and hence should not be applied in such situations. As the Supreme Court noted in United States v. Calandra, 414 U.S. 338, 348 (1974), the rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect ...". A reasonable good faith test would act to restrain the rule to this proper role. By contrast, allowing the admission of evidence seized other than in reasonable good faith to avoid a "grave miscarriage of justice" -- as in S. 2304 -- must be premised on a theory that does not rely on deterrence as the constitutional underpinning for the rule. But we are aware of no plausible theory to sustain such a limitation on the rule's application. The Administration's "reasonable good faith" proposal was, as you know, derived closely from the holding of the Fifth Circuit en banc in United States v. Williams, 622 F. 2d 830 (1980), cert. denied, 449 U.S. 1127 (1981), following an exhaustive analysis of relevant Supreme Court cases. We are aware of no comparable judicial support for allowing the admission of illegally seized evidence to prevent a "grave miscarriage of justice."

Moreover, the Administration's proposal is fully consistent with the principles of "judicial integrity" -- originally thought to be a rationale for the rule and first articulated in Weeks v. United States, 232 U.S. 383 (1914) -- whereas S. 2304 has the potential for violating this justification for the rule. The Supreme Court in United States v. Peltier, 422 U.S. 531, 537-538 (1975) noted that "the 'imperative of judicial integrity' is also not offended if the law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law ...". The adoption of a less than reasonable good faith standard, even if only to avoid a grave miscarriage of justice in a particular case, invites the resurrection of the judicial integrity principle as a justification for continuing to apply the rule in cases where it operates only to frustrate honest, good-faith law enforcement.

For the above reasons, the Department of Justice supports S. 2304, only if the phrase "or a grave miscarriage of justice" is deleted. The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

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